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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 120

HOWARD S. PALMER, JAMES LEE LOOMIS AND HENRY B. SAWYER, TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR, PETITIONERS,

vs.

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, TRUSTEE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 1, 1940.

CERTIORARI GRANTED OCTOBER 14, 1940.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

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INDEX.

	Page
Proceedings in U. S. C. C. A., Second Circuit	1
Statement under Rule XIII	1
Record from D. C. U. S., District of Connecticut	4
Petition of New Haven Trustees for directions concerning further payment of taxes and other charges for the account of the Old Colony and Boston and Providence Estates	4
Order of notice	11
Memorandum of decision on petition for order No. 398	12
Order No. 398	20
Petition of the Old Colony Trust Company, Trustee, for leave to intervene specially	20
Order permitting Old Colony Trust Company, Trustee, to intervene specially	23

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 28, 1940.

—1103

148 (7) That, not later than November 30, 1935, the Debtor shall file with the Clerk of this Court a statement of the assets and liabilities of the Debtor as of the close of business on October 23, 1935, and, within forty-five days after the close of each calendar month thereafter, shall file with said Clerk a statement of the assets and liabilities of the Debtor as of the close of business on the last day of the second preceding calendar month, together with a summary statement of the revenues and expenses of the Debtor for the second preceding calendar month.

149 All such statements shall be certified as correct by the chief accounting officer of the Debtor.

(8) That all persons, firms and corporations whatsoever, and wheresoever situated, located or domiciled, be and they hereby are restrained and enjoined from interfering with, seizing, converting, appropriating, attaching, garnisheeing, levying upon, or enforcing liens upon, or in any manner whatsoever disturbing any portion of the assets, goods, money, deposit balances, credits, choses in action, interests, railroads, properties, or premises belonging to, or in the possession of the Debtor, or from taking possession of, or in any way interfering with the

150 same, or any part thereof, or from interfering in any manner with the operation of its railroad or properties or the carrying on of its business by the Debtor under the orders of this Court, or from commencing or continuing any suits against the Debtor wherein any bond, except a bond for costs, may be required of the Debtor herein, either during the pendency of said proceedings or of subsequent proceedings therein by appeal or otherwise: Provided, that suits or claims for damages caused by the operation of trains, busses, or other means of transportation may be filed and prosecuted to judgment in any court of competent jurisdiction.

151

(9) That all persons and corporations holding collateral, including deposit balances or credits, heretofore pledged by the Debtor as security for its notes or obligations be and each of them hereby is restrained and enjoined from selling, converting or otherwise disposing of such collateral, deposit balances or other credits, or any part thereof, until further order of this Court.

(10) That the Debtor hereby is directed to give notice by mailing a copy of this Order to its mortgage trustees, and to cause a notice, directed to its creditors and stockholders, to be published within five days from the date 152
of the entry of this Order once in The New Haven Journal-Courier, a newspaper published in the City of New Haven, and in The Hartford Daily Courant, a newspaper published in the City of Hartford, State of Connecticut, and in The Boston Herald, a newspaper published in the City of Boston, State of Massachusetts, and in The Wall Street Journal, a newspaper published in the City of New York, State of New York, and in The Providence Journal, a newspaper published in the City of Providence, State of Rhode Island, of a hearing to be held on November 6, 1935, at twelve o'clock noon, in the Court Room occupied by this Court in the United States Court House, 153
New Haven, Connecticut, at which hearing, or any adjournment thereof, this Court will appoint one or more trustees of the Debtor's property. The notice of such hearing shall be substantially in the form of the notice annexed hereto, made a part hereof, and marked "Exhibit A".

When such mailing and publication has been completed the Debtor shall file with the Clerk of this Court its report with respect thereto.

154 *Exhibit A, Annexed to Order Approving Petitio New Haven for Reorganization.*

(11) This Court reserves full right and juris to enter at any time such further orders in the pr as the Court may deem proper, including the ri amend, extend, limit, modify, or otherwise chan rescind the present order.

Enter:

CARROLL C. HINC
District J

155 Dated:
October 23, 1935.

EXHIBIT A, ANNEXED TO ORDER APPROV PETITION OF NEW HAVEN FOR REORGANIZATION.

NOTICE TO ALL CREDITORS AND STOCKHOLDERS OF THE York, New Haven and Hartford Railroad Compa

Pursuant to an order entered October 23, 1935, by
156 Honorable Carroll C. Hincks, Judge of the District C of the United States for the District of Connecti notice is hereby given that a hearing will be held November 6, 1935, at twelve o'clock noon, by said Ju in the courtroom usually occupied by him in the Un States Court House, New Haven, Connecticut, at wh hearing the Court will, pursuant to the provisions Section 77 of the Act entitled: "An Act to establish uniform system of bankruptcy throughout the Uni States", approved July 1, 1898, and acts amendato thereof and supplementary thereto, appoint one or m

157

trustees of the property of said The New York, New Haven and Hartford Railroad Company.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

Dated at New Haven, Connecticut, October 23, 1935.

(c) Order Appointing Trustees for New Haven.

(Order No. 5.)

158

[SAME TITLE.]

The matter of the appointment of one or more trustees of the Debtor's property, pursuant to the requirements of the amendment of August 27, 1935 to Section 77 of the Act of July 1, 1898, entitled "An Act to establish a uniform system of bankruptcy throughout the United States", as amended, having come on for hearing on November 6, 1935, and it appearing to the Court that the Debtor has given notice of this hearing as directed in its Order No. 1 of October 23, 1935, and the Court having heard the recommendations of counsel representing the Debtor and certain insurance companies and savings banks as to the personnel of the trustees, and the Court being of the opinion that the appointment of trustees herein should not disturb the continuity of operations by the corporate organization of the Debtor and should be at minimum cost to the Debtor, and that the appointment of three trustees would best serve the interests of all parties in interest, it is ORDERED:

159

1. That Howard S. Palmer, President of the Debtor, of

160 New Haven, W. M. Daniels, of New Haven, and James Lee Loomis of Granby, both of those later named being persons who within one year prior to the date of this order have not been officers, directors, or employees, of the Debtor, any subsidiary corporation, or any holding company connected therewith, be and they hereby are appointed Trustess of the Debtor's property.

2. That the bond of each of said Trustees be and it hereby is fixed at $50,000.00, conditioned to the effect that he will well and truly perform the duties of a Trustee of
161 the Debtor's property and duly account for any moneys and properties which may come into his hands, and abide by and perform all things which he shall be directed by the Court to do.

3. That these appointments shall become effective upon ratification thereof by the Interstate Commerce Commission.

4. That said Trustees shall within ten days after such ratification, execute and file with the Clerk of this Court such bonds, with sureties approved by said Clerk, for the benefit of whom it may concern.

162

5. That said Trustees shall have, following said ratification and upon filing such bonds, all the title and shall exercise, subject to the control of this Court and consistently with the provisions of said amendatory Section 77, all of the powers of a trustee appointed pursuant to Section 44 of said Act or any other section of said Act, and, to the extent not inconsistent with said amendatory Section 77, the powers of a receiver in an equity proceeding, and, subject to the control of this Court and the jurisdiction of the Interstate Commerce Commission as provided

163

by the Interstate Commerce Act as now or hereafter amended, the power to operate the business of the Debtor.

6. That, following said ratification and upon the filing of such bonds, all of the property, real, personal and mixed, of every kind and nature whatsoever, of the Debtor shall by this order be vested in said Howard S. Palmer, W. M. Daniels and said James Lee Loomis, as Trustees of the Debtor's property.

7. That said Trustees shall have, following said ratification and upon filing such bonds, all the rights, privileges, powers and duties heretofore granted to or imposed upon the Debtor pursuant to said Order No. 1 of this Court and all orders supplementary thereto and amendatory thereof, and each and all of the orders heretofore entered in this proceeding shall with respect to said Trustees and the property of the Debtor, be of like force and effect as though said Trustees were therein specifically named in the place of the Debtor, all of said orders being hereby incorporated in and made a part of this order by reference.

164

8. That, following said ratification and upon filing such bonds, said Trustees shall by this order have authority and power to designate employees of the Debtor to execute and deliver, in their stead and as their agents, checks, drafts, vouchers, orders, contracts, deeds, leases, easements, and any and all instruments of every kind and nature whatsoever, incidental to the operation of the property of the Debtor, and that such instruments, so executed by the agents of said Trustees, shall bind said Trustees the same as though their signatures had been affixed thereto.

165

9. That this Court reserves full right and jurisdiction to make, from time to time, such additional orders herein

166 as the Court may deem proper, as well as any orders amending, extending, limiting, modifying, or otherwise changing this order, and in all respects to regulate and control the conduct of said Trustees.

10. That the Clerk of this Court forthwith transmit to the Interstate Commerce Commission, Washington, D. C., a certified copy of this order and a copy of the stenographic minutes of said hearing of November 6, 1935, to the end that said Interstate Commerce Commission may
167 determine upon the ratification of the appointments hereby designated and may, at its convenience, file with this Court its determination thereon.

Enter,

CARROLL C. HINCKS,
District Judge.

Dated, November 8th, 1935.

(d) Petition of Bankers Trust Company, as Trustee for Segregation Order.

168 **(Petition for Order No. 7.)**

[SAME TITLE:]

To the Honorable the Judges of the District Court of the United States for the District of Connecticut:

The petition of Bankers Trust Company, as Trustee (herein called "Petitioner") under the First and Refund-

169

ing Mortgage dated December 9, 1920 (herein called the "Mortgage") and the Third Supplement thereto dated December 1, 1927, of The New York, New Haven and Hartford Railroad Company (herein called the "Debtor"), respectfully shows:

1. Petitioner has this day filed its petition for leave to intervene herein.

2. By the Mortgage, the Debtor granted, bargained, sold, released, conveyed, assigned, transferred, pledged and set over to Petitioner, as Trustee, subject as therein set forth: 170

1. The lines of railroad therein described (Granting Clause First);

2. The leasehold right, title and interest of the Debtor therein described, in and to the railroads connecting with the railroads of the Debtor (Granting Clause Second);

3. The trackage rights and other rights therein described (Granting Clause Third);

4. The terminals, piers, wharves and other property therein described, including equipment (Granting Clause Fourth); 171

5. The stocks, bonds and evidences of indebtedness therein described, owned by the Debtor (Granting Clause Fifth); and

6. Other property therein described (Granting Clause Sixth).

3. By the Third Supplement dated December 1, 1927 to said Mortgage, the Debtor granted, bargained, sold, re-

172 leased, conveyed, assigned, transferred, pledged and set over unto Petitioner, as Trustee, all of its right, title and interest in and to all the merged property of Harlem River and Port Chester Railroad Company, and of Central New England Railway Company, therein described, subject as therein set forth.

4. Article Seven of the Mortgage provides, among other things, that in case default shall be made as in the respective sections thereof set forth,

173 (1) The Trustee may forthwith enter into or upon all or any part of the mortgaged premises; may use, operate, manage and control the same; and, in such case, shall be entitled to collect and receive all tolls, earnings, income, rents, issues and profits thereof (Section 1).

(2) The Trustee may forthwith proceed to protect and enforce its rights and the rights of the holders of the Bonds and pre-existing obligations under the Mortgage by a suit or suits in equity or at law, either for the specific performance of any covenant or agreement contained in the Mortgage, or in aid 174 of the execution of any power therein granted, or for the foreclosure of the Mortgage for interest, or for principal, or both, or for the enforcement of any other appropriate legal or equitable remedy, as the Trustee shall deem most effectual in support of any of its rights or duties thereunder (Section 4).

(3) Upon filing a bill in equity or upon other commencement of judicial proceedings by the Trustee, as provided in Article Seven, to enforce any right under the Mortgage, the Trustee shall be en-

175

titled to exercise any and all rights and powers conferred by the Mortgage, and, as a matter of right, the Trustee shall be entitled to the appointment of a Receiver of the mortgaged premises and of the tolls, earnings, revenue, rents, issues, profits and other income thereof, with such powers as the court making such appointment shall confer, and shall be entitled to the application by any such Receiver of the net income for the benefit of the holders of the Bonds and pre-existing obligations then secured by the Mortgage, in accordance with the trusts therein declared (Section 5).

176

5. Default has been made under the Mortgage in the respect set forth in the petition verified November 4, 1935 of Petitioner, as Trustee, for leave to intervene herein, and said default still continues. By reason of such default, Petitioner is entitled to exercise the rights and remedies specified in Article Seven of the Mortgage as exercisable upon the happening of a default.

6. Because this Court is in the possession of the mortgaged premises in these proceedings, Petitioner is unable to exercise any of the above-mentioned rights and remedies conferred upon Petitioner, as Trustee, by the Mortgage, except as this Court may grant to Petitioner in these proceedings the relief to which Petitioner is entitled.

177

7. Upon information and belief:

The Mortgage covers 1,347 miles of railroad owned by the Debtor in fee, leasehold interests in 847 miles of railroad, and rights of entrance to and use of the Grand Central Station in New York City, New York. It is a

178 first lien on 435 miles, and, subject to closed mortgages securing $62,699,000 principal amount of the Bonds outstanding with the public, is expressed to be a second lien on 900 miles of the mileage owned by the Debtor. It is also a third lien on 12 miles of railroad owned by the Debtor.

The Company's main line from New York City (Woodlawn Junction) to Providence, Rhode Island, comprising a large part of the "Shore Line" route, and the main line from New Haven, Connecticut, to Springfield, Massachu-
179 setts, a total of 234 miles, is covered by the Mortgage as a direct first lien, with the exception of 62 miles on which the Mortgage is a second lien, subject only to a closed mortgage securing $1,000,000 principal amount of bonds.

8. Upon information and belief:

In the Railroad System and properties of the Debtor, of which this Court has taken jurisdiction in these proceedings, there may be comprised certain properties upon which the Mortgage is not a lien of any rank, as well as certain properties upon which, as alleged above, the Mortgage is a subordinate lien and is not a first lien. Certain
180 portions and parts of the railroad lines or other property of the Debtor are separately subject to the liens of various mortgages other than the Mortgage under which Petitioner is Trustee.

9. The security provided by the Mortgage and the Third Supplement thereto for payment of the Bonds outstanding under the Mortgage consists of not only the railroad lines, leasehold interests and other property, including equipment, securities and stocks, set forth above, but also the tolls, earnings, revenue, rents, issues, profits and other

181

income derived from such lines of railroad, leasehold interests, securities and other properties. In order that the rights of Petitioner, as Trustee, and of the holders of Bonds and pre-existing obligations secured by the Mortgage and the Third Supplement thereto may be ascertained and determined, it is necessary that an account be kept of the net earnings derived from operation of the properties covered by the lien of the Mortgage and Third Supplement and of earnings covered by the lien of the Mortgage derived from other sources, and that such earnings be segregated from earnings derived from operation of other properties owned by the Debtor which are not covered by the lien of the Mortgage and Third Supplement, and from earnings derived from other sources. Furthermore, in order that the rights of Petitioner, as Trustee, and of the holders of the Bonds and pre-existing obligations secured by the Mortgage and Third Supplement may be ascertained and determined, it is necessary that the earnings derived from operation of the property upon which the Mortgage and the Third Supplement, respectively, constitute a first lien, be segregated from earning derived from operation of properties upon which the Mortgage may be a subordinate lien.

182

183

10. Petitioner respectfully demands that all tolls, earnings, revenue, rents, issues, profits and other income derived from operation of properties covered by the lien of the Mortgage and the Third Supplement, and all other income covered by the lien of the Mortgage, be segregated, sequestered and impounded for the benefit of Petitioner, as Trustee, and the holders of Bonds and pre-existing obligations secured by the lien of the Mortgage and the Third Supplement thereto.

WHEREFORE, without waiving any of the rights and rem-

184 edies conferred by the Mortgage and the Third Supplement, but auxiliary thereto and in aid and furtherance thereof, Petitioner respectfully prays:

(1) that the Judge direct the Debtor, and the Trustee or Trustees of the Debtor, when appointed, to keep such records and accounts, in addition to the accounts prescribed by the Interstate Commerce Commission, as will permit of a segregation and allocation of the earnings and expenses between and to the divisions and parts of the Railroad or other property of the Debtor which are sepa-
185 rately subject to the liens of various mortgages;

(2) that the Judge determine upon a method or formula by which such segregation and allocation shall be made, and refer to the Interstate Commerce Commission for its recommendations after hearings thereon, if the parties to these proceedings shall so request and/or said Commission determine necessary or desirable, as to the method or formula by which such segregation and allocation shall be made;

(3) that the Judge direct that such segregation and allocation be made at the expense of the Debtor's Estate;
186 and

(4) for such other and further relief which may be lawful as Petitioner may hereafter apply for and as to this Court may seem just and equitable.

Dated November 4, 1935.

BANKERS TRUST COMPANY,
as Trustee,
By R. G. PAGE,
Vice-President.

(Corporate Seal)

Petition of Rhode Island Hospital Trust Company, Trustee, for Segregation Order. 187

Attest:
W. C. MEYERS,
Assistant Secretary.

WIGGIN & DANA,
205 Church Street,
New Haven, Connecticut.

F. H. WIGGIN,

WHITE & CASE.
14 Wall Street,
New York, N. Y.
Attorneys for Petitioner. 188

FITZHUGH MCGREW,
Of Counsel.

(Verification omitted in printing.)

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e) Petition of Rhode Island Hospital Trust Company, Trustee, for Segregation Order.

(Petition for Order No. 18.)

[SAME TITLE.] 189

On December 2, 1935 Rhode Island Hospital Trust Company, as Trustee under mortgage of The Providence Terminal Company dated March 1, 1906, petitioned the District Court of the United States for the District of Connecticut for an order segregating, sequestering, impounding and holding in trust tolls, earnings, revenues, rents, issues, profits and other income

190 **(f) Petition of United States Trust Company of New York, as Trustee, for Segregation Order.**
(Petition for Order No. 29.)

[SAME TITLE.]

On December 23, 1935, United States Trust Company of New York, as Trustee of the First Mortgage of The Harlem River and Port Chester Railroad Company and The New York, New Haven and Hartford Railroad Company, dated May 16, 1904, petitioned the District Court of the United
191 States for the District of Connecticut for an order segregating and sequestering rents, issues, profits, tolls and other income of the mortgaged property for the benefit of said Trustee and the holders of the bonds secured by said mortgage.

(g) Order Upon Petitions for Segregation of Earnings.

(Orders Nos. 7, 18 and 29.)

192 [SAME TITLE.]

This cause coming on to be heard this day upon the petition for segregation of earnings verified November 4, 1935 of Bankers Trust Company, as Trustee under the First and Refunding Mortgage dated December 9, 1920 and the third supplement thereto dated December 1, 1927 of the Debtor, upon the petition for segregation of earnings verified November 29, 1935 of Rhode Island Hou-

193

pital Trust Company, as Trustee under mortgage of the Providence Terminal Company dated March 1, 1906, and upon the petition for segregation of earnings verified December 20, 1935 of the United States Trust Company of New York, as Trustee under the First Mortgage of the Harlem River and Port Chester Railroad Company and The New York, New Haven and Hartford Railroad Company dated May 16, 1904, and the Court being fully advised in the premises, and no one opposing, it is

ORDERED, ADJUDGED AND DECREED:

1. That no Trustee of a mortgage covering property included in the Railroad System of the Debtor shall be 194
required to make any further demand or application for the enforcement in this proceeding of any lien or right in respect of any of the tolls, earnings, incomes, rents, issues and profits of the property covered by the mortgage, but the rights of each Mortgage Trustee shall be determined as if due demand or application had been made by such Trustee at the earliest date or dates when any such Trustee would have been entitled to make such demand or application under the terms of the mortgage of which it is Trustee, or as a matter of law; and

2. That the time of the Trustees of Debtor's estate and any other parties to these proceedings to answer the above- 195
mentioned petitions for segregation be and the same hereby is extended until further order of this Court; and

3. With respect to the prayers in the above-mentioned petitions that the Court determine, segregate and set aside in separate accounts for disposition in accordance with the rights given by the respective mortgage indentures to the Mortgage Trustees and the holders of the bonds issued

196 *Report of Mailing of Notice of Disaffirmance of Lease.*

THE COURT FINDS

That inasmuch as all of the lines of the Railway System of the Debtor are operated as a unit it is impossible to determine and allocate the earnings and income of the properties subject to the various liens unless and until a proper basis of allocation has been established by this Court and the Court reserves the right upon due notice to the parties in interest to hereafter consider, and determine this question if and as the necessities of the case may require such determination.

197 Enter,

CARROLL C. HINCKS,
District Judge.

Dated, January 17, 1936.

(h) Report of Mailing of Notice of Disaffirmance of Lease Dated February 15, 1893 from Old Colony Railroad Company to The New York, New Haven and Hartford Railroad Company.

198 [SAME TITLE.]

This report of mailing dated June 2, 1936 reads in part as follows:

> "That pursuant to the authority granted in Orders No. 1 and No. 5 herein said Trustees [*i. e.*, the New Haven Trustees] have given notice to Old Colony Railroad Company of the disaffirmance and rejection of the unexpired lease dated February 15, 1893 from Old Colony Railroad Company to The New York, New Haven and Hartford Railroad

(i) Petition of Old Colony Railroad Company for Reorganization Herein. 199

(Petition for Order No. 74.)

[SAME TITLE.]

To the Honorable the Judges of the District Court of the United States for the District of Connecticut:

The petition of Old Colony Railroad Company, a railroad corporation, with principal office at South Station, Boston, Massachusetts, respectfully shows: 200

1. That the petitioner is a railroad corporation, duly organized in 1872 by a union of Old Colony and Newport Railway Company and Cape Cod Railroad Company under the laws of the Commonwealth of Massachusetts, empowered to own, lease and operate railroads, and is a citizen and resident of said Commonwealth of Massachusetts; that it owns and is lessee of railroads in that Commonwealth and in the State of Rhode Island; that it is not a street, suburban or interurban electric railway; that the lines of railroad owned or leased by the petitioner form an important part of the system of the Debtor herein and carrier operations have been for many years conducted over said lines by the Debtor herein, which owns a majority of the capital stock of the petitioner having power to vote for the election of directors; that the terms and conditions of such operation have been as stipulated in a certain indenture (referred to hereafter as "said lease") from the petitioner to Debtor, a copy of which is attached hereto as Exhibit A. 201

2. That on October 23, 1935 the Debtor filed in this

202 *Petition of Old Colony Railroad Co. for Reorganization Herein.*

Court its petition in the above entitled proceeding under Sec. 77 of Chapter VIII of the Acts of Congress relating to bankruptcy; that on the same date this Court entered its Order No. 1 approving the Debtor's said petition as properly filed under said Section; and that thereafter this Court appointed Trustees of the property of the Debtor.

3. That since their qualification the Trustees so appointed by this Court have continued to conduct carrier operations over said lines of railroad owned or leased by
203 the petitioner.

4. That certain payments, including rentals, payments of interest on funded and unfunded debt, and payments of taxes, which heretofore became due since October 23, 1935 under said lease were made by the Debtor or said Trustees by authority of this Court; and that Order No. 1 and Order No. 17 herein were by their terms applicable to such payments.

5. That the rental due March 31, 1936 in the amount of $438,858 was not paid by the Debtor or by said Trustees; that upon a petition by said Trustees filed on April 23,
204 after notice and hearing, this Court entered an order April 28 advising said Trustees to withhold said payment until further order; that said payment is now in default and the grace period stipulated in said lease has expired; that the interest in the sum of $139,950 payable by the Debtor or said Trustees under the terms of said lease, on June 1, 1936 upon the petitioner's Series "B" 5% bonds (maturing December 1, 1945) has not been paid.

6. That on June 1, 1936, said Trustees gave formal notice to the petitioner of their disaffirmance of said lease;

205

that the afore-mentioned Order No. 1 provided among other things that the Debtor might prior to April 23, 1936 disaffirm any of its existing leases and that the performance by the Debtor of any lease within such period allowed for the disaffirmance thereof should not constitute or be evidence of the adoption or assumption by the Debtor of any such lease or the waiver by it of its right to disaffirm the same; that by Order No. 56 herein the time within which any such disaffirmance might be made was extended to October 23, 1936; that Order No. 17 herein contains provisions that in case any lease should be disaffirmed or rejected by the Debtor or the Trustees of the Debtor, the operation of the leased property and any payments made [pursuant to the provisions of Order No. 1 paragraph (3) (b) herein] to comply with the obligations of the Debtor under any such lease "shall be deemed to have been made for the account of the lessors and such payments shall be recovered, set off and made and charged on the earnings and/or properties of the lessors prior to any mortgage or other lien thereon, by such method as the Court shall determine."

206

7. That the petitioner is now compelled to assume all the risks of operation of its lines of railroad and is a railroad corporation as defined in Section 77 of Chapter VIII of the acts of Congress relating to bankruptcy.

207

8. That the petitioner is entitled under the provisions of said lease to re-enter upon the demised premises and the same have and possess as of its former estate without prejudice to its right of action for arrears of rent or breach of covenant, but that the petitioner has no funds, no equipment and no organization which would enable it to resume operation

208 is now impracticable and contrary to the public interest and would entail irreparable loss and damage to the petitioner and its security holders; that the petitioner could at best only accomplish a technical resumption of separate operation by agreement with said Trustees; that the petitioner's lines of railroad are already being operated by said Trustees pursuant to the orders of this Court; that said lines and those of the Debtor are now operated as integral parts of one railway system; and the problems of operation and administration of the property of the
209 Debtor and that of the petitioner are now so closely interrelated that the interests of the petitioner and its security holders will be best conserved by the continuance of unified operation by said Trustees under the supervision of this Court pending the reorganization of the Debtor or the further order of this Court; that the petitioner approves and agrees to such operation of its property by said Trustees for the petitioner's account until further notice.

9. That on June 1, 1936 there became due interest in the amount of $139,950 on the 5% First Mortgage Gold Bonds Series "B" of the petitioner and on July 1, 1936 there will become due interest in the total amount of
210 $108,125 upon two other issues of bonds of the petitioner [viz. the 4½% First Mortgage Gold Bonds, Series "C" and the 4% Bonds due January 1, 1938]; that on June 15 there will be due $61,628.90 quarterly installment of federal income taxes of the petitioner; that on June 15 there will mature bank loans of the petitioner in the aggregate amount of $1,000,000 and on June 23 there will mature an additional bank loan of the petitioner in the amount of $400,000; that on June 30 or July 1 there will become due $100,000 and on July 1 $54,975

211

Boston and Providence Railroad Corporation to the petitioner; that on August 1 there will become due interest in the amount of $96,250 upon the 5½% First Mortgage Gold Bonds Series "A" of the petitioner, and that other obligations of the petitioner in substantial amounts will fall due from time to time during the remainder of the year 1936, that the petitioner is without funds to meet and discharge the aforesaid obligations, and, on information and belief alleges that it has no means of borrowing or otherwise procuring said funds and that it is unable to meet its debts as they mature.

212

10. That the petitioner desires to effect a reorganization in connection with or as a part of the plan of reorganization of the Debtor herein.

11. That a copy of this petition is this day being filed with the Interstate Commerce Commission.

12. That the filing of this petition was duly authorized by resolution of the Board of Directors of the petitioner adopted at a meeting thereof duly held June 2, 1936.

WHEREFORE, your petitioner prays

213

(1) That an order may be entered approving this petition as properly filed under Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy, that the Court take and exercise its jurisdiction over the property and affairs of the petitioner and make such orders and enter such judgments and decrees from time to time as may be proper, necessary or incidental to the reorganization of the property, debt and corporate structure of the petitioner and that it

214 *Exhibit A, Annexed to Petition of Old Colony Railroad Co. for Reorganization Herein.*

granted all other and further relief to which it may be entitled.

2. That the Trustees of the property of the Debtor herein be authorized and directed to continue until further order to operate the petitioner's property for the account of the petitioner, and to preserve such basic information and keep such records and accounts in addition to the accounts prescribed by the Interstate Commerce Commission as will permit of such a segregation and allocation as the necessities of the case may require of the earnings and expenses between said property and the remaining property under the administration of the Trustees.

215

OLD COLONY RAILROAD COMPANY,
By ARTHUR P. RUSSELL
President.

Dated: June 2, 1936.

(Verified by Arthur P. Russell, as President, on June 2, 1936.)

EXHIBIT A, ANNEXED TO PETITION OF OLD COLONY RAILROAD CO. FOR REORGANIZATION HEREIN.

216

LEASE BY THE OLD COLONY RAILROAD COMPANY TO THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY FOR TERM OF NINETY-NINE YEARS FROM MARCH 1, 1893 DATED FEBRUARY 15, 1893

The Old Colony Railroad Company (hereinafter called the lessor), hereby demises and lets, for the term of ninety-nine years beginning the first day of March, 1893, unto The New York, New Haven and Hartford Railroad Com-

217

pany (hereinafter called the lessee), and to its successors and assigns, both the lessor and lessee being corporations existing under the laws of the Commonwealth of Massachusetts and whose roads connect with each other, all and singular its railroads and property of every description, whether within its location or not, including all rights, franchises, easements, privileges and appurtenances thereunto belonging, together with the right to demand and receive for the lessee's own use all tolls, rents, revenues, income and profits of the demised premises, including also therein all the right, title and interest of the lessor in and to any and all railroads operated by it, under 218
lease or otherwise, and in or to any stock and securities of other corporations owned by it, or held by, or for it, all dividends thereon, and the right of voting on the same, and in and to all contracts and obligations of or with other railroads, corporations or individuals, and all income advantages and benefits to be derived therefrom, hereby assigning and transferring unto the lessee, under the terms and provisions of this lease, and for the purposes thereof, and subject to all obligations and incumbrances thereon, all its railroad, property, franchises and assets of every description, however described and wherever situated, except the corporate seal, the stockholders' and 219
directors' record books, and the transfer and stock books, to which the lessee may have access at reasonable times.

And the lessor covenants with the lessee that it will suffer and permit the lessee, it keeping all the covenants on its part as herein contained, to occupy, possess and enjoy said premises, property, rights, franchises and privileges during the term aforesaid without hindrance or molestation.

And the lessor hereby makes, constitutes and appoints the lessee its agent during the term of this lease to operate

220 *Exhibit A, Annexed to Petition of Old Colony Railroad Co. for Reorganization Herein.*

all its leased railroads and property, the lessee herein to do and perform as such agent all acts with reference thereto incumbent by law or by contract upon the lessor herein and in consideration thereof to receive the income and profit arising from such operation; and the lessor hereby agrees, as soon as it legally may, to make from time to time proper and complete assignments to the lessee of all leasehold rights of the lessor.

And the lessor covenants that during the continuance of this lease it will maintain its corporate organization,
221 the lessee paying all reasonable and proper expenses thereof, and, for that purpose will hold all necessary meetings, elect all necessary officers and make all necessary records, reports, reissues of stock certificates, and transfers and registrations of bonds; and that it will, from time to time, whenever requested by the lessee, take real estate for the convenient operation of said railroads, the lessee, however, advancing therefor all damages and expenses; and that the lessee may use the lessor's name in bringing or defending any suits or proceedings so far as it is or may be necessary for the protection or enjoyment of said demised premises, property, rights, franchises and privileges, or for the acquisition of additional real estate, but
222 at the sole expense of the lessee, saving the lessor harmless from all loss, costs or damages thereby accruing.

And the lessor covenants that, for the purpose of making permanent improvements upon the property hereby demised and for the purpose of discharging its indebtedness, it will at the request of the lessee make such lawful issue, and reissue in renewal, of bonds or of stock, or both, as shall from time to time be necessary and proper to be issued; and that at the request of the lessee it will execute mortgages of said demised premises or any part thereof to secure the payment of the principal and interest

223

of such bonds; and that it will not issue any stock or bonds, or create any indebtedness or lien upon said demised premises, or property, except under and in accordance with the directions, or by the previous written consent, of the lessee.

And the lessor hereby makes, constitutes and appoints the lessee its true and sufficient and lawful attorney from time to time, to bargain and sell, with the assent of the directors of the lessor, lands and structures of the lessor on such terms as to the lessee shall seem meet, and hereby authorizes the lessee in the name of the lessor to make, execute, acknowledge and deliver good and sufficient

224

deeds and conveyances of all the right, title and interest of the lessor so bargained and sold in and to the same; the lessor agreeing, whenever thereto requested by the lessee, and upon reasonable notice, to affix its corporate seal to such deeds and conveyances; and the lessee covenants and agrees that other lands and structures of equal value shall be conveyed to the lessor in lieu of any lands or structures sold and conveyed, and that if the lessee shall under any power herein conferred sell or abandon the lands and structures now constituting the terminals leased to the lessor in the city of Providence, the lessee shall acquire, construct and convey to the lessor of the lessor herein new

225

terminals of equal value and sufficient for its business, and such as will conform to the agreements of the lease of the Boston and Providence Railroad Corporation to the lessor; all property so acquired to become a part of the demised premises.

And the lessor covenants that it will at any time or times hereafter upon the reasonable request of the lessee, make, and execute, or cause, or procure to be made, done and executed all and every such further and other lawful and reasonable acts, conveyances, transfers, assignments and

226 *Exhibit A, Annexed to Petition of Old Colony Railroad Co. for Reorganization Herein.*

assurances in the law, for the better and more effectually vesting and confirming the premises and property hereby leased, or intended so to be, in and to the lessee, as by the lessee shall be reasonably devised, advised or required.

And the lessee covenants to pay as rent hereunder on the 30th day of June, 1893, a sum equal to a dividend of two dollars and thirty-three and one-third cents upon each share of the capital stock of the lessor then outstanding; and thereafter, except as hereinafter provided, sums equal to dividends at the rate of seven per cent per annum, pay-
227 able quarterly, upon said capital stock then from time to time outstanding.

And the lessee further covenants that as soon as it lawfully may, it will prior to January first, 1900, issue in the proportion of nine shares of its capital stock in exchange for ten shares of the capital stock of the lessor, then outstanding, and will give notice thereof by mail to each stockholder of the lessor and thereafter, and until six months after said exchange shall be offered to the stockholders of the lessor, upon the assignment to the lessee of ten shares of the capital stock of the lessor or any multiple thereof, and the surrender of the certificate or certificates therefor, the lessee will, whenever its stock transfer books
228 are open, issue to the owner of said shares in exchange therefor, a certificate for the proportionate number as above provided, of shares of the capital stock of the lessee.

And the lessee covenants that in case it shall be unable to perform the covenants contained in the preceding paragraph prior to the first day of July, 1893, it will thereafter, and between said first day of July and six months after the date when it shall be able to perform said covenants, pay (in lieu of said sums equal to dividends at the rate of seven per cent per annum) a sum on each share of the outstanding capital stock from time to time of the lessor equal

229

to nine-tenths of such dividends as the lessee shall pay upon each share of its own capital stock and will secure to the stockholders of the lessor the same proportion of such pecuniary privileges as the lessee shall give upon each share of its own capital stock.

And the lessee further covenants to provide for the payment in the manner hereinbefore mentioned, of the principal of all funded indebtedness for the payment of which the lessor may be legally holden as the same shall from time to time mature, and to assume and pay all the other obligations of the lessor of every name and nature as the same shall from time to time fall due; and to keep and perform all and singular the contracts relating to said demised premises and property now in force and binding on the lessor, whether arising under leases or otherwise, and as to property leased to the lessor, the lessee shall be subject to the leases under which such property is held.

230

And the lessee further covenants to pay, during each year of said term, all taxes, rates, charges and assessments, ordinary and extraordinary, which may be lawfully imposed or assessed in any way upon the lessor or lessee with reference to the premises and property hereby demised, the capital stock of the lessor, its indebtedness, franchises and revenues or said rental; said payments to be made to the authority or treasurer entitled by law to receive the same, whether Federal, State or municipal, so that said lessor shall be saved harmless, during the continuance of this lease from any tax, assessment or charge under laws or proceedings made or authorized by the United States or any State or municipality.

231

Provided, that (1) if the lessee shall at any time fail to pay the interest on the lessor's bonded indebtedness when the same falls due, or (2) if the lessee shall fail for thirty

232 days to make any quarterly payment of rent as above stipulated, or (3) if the lessee shall fail to keep or perform any other of its covenants or agreements in this lease contained, and such default shall continue for six months after written notice thereof shall have been given by the lessor to the lessee; then, and in either of said events, this lease shall expire and terminate, at the option of the lessor, and the lessor may thereupon re-enter upon the demised premises, and the same have and possess as of its former estate without prejudice to its right of action for arrears
233 of rent or breach of covenant.

And the lessee covenants that it will at its own cost and expense during the continuance of this lease, furnish and provide all such books, forms and papers, and do and perform all such acts and things as may be required for the proper distribution of dividends, payment of interest and for the issue, record and transfer of the stock of the lessor, and for the issue, registration and transfer of any bonds herein referred to, as a part of the expenses of organization.

And the lessee covenants that it will operate the lessor's said railroads and the leased railroads of the lessor as required by all legal enactments from time to time in force,
234 and furnish all equipment, in addition to that hereby demised, which may be necessary for such operation, and maintain said demised premises and property during said term in good condition and up to its present standard as a railroad; and that it will make all additions, alterations, improvements and betterments which may be necessary or proper with reference to the premises and property hereby leased; and that all lands, structures, improvements, betterments and renewals so added to or made upon the real estate hereby demised shall become the property of the

235

lessor, and a part of the demised premises; and that at the expiration of this lease, whether by lapse of time or otherwise, it will deliver to the lessor possession of said demised premises, and leased properties, rights, franchises and privileges, together with any and all additions and substitutions which may have been made thereto as aforesaid, and will also return or deliver, in lieu of the personal property set out in the inventory hereinafter provided to be made, the same or other personal property of similar character, value and uses, and appropriate for the operation of the lessor's railroads.

236

And the lessee covenants that it will save the lessor harmless from all suits, costs, damages and expenses by reason of any act or omission of the lessee in the use of said demised premises, under this lease; and will, at its own expense, defend all suits pending or brought against the lessor and pay the judgments therein when demanded on final process; and that it will during said term make all returns required by the laws of any State, or of the United States, in relation to the property hereby leased, to any public officer, or other legal authority; and that, should any returns be required by law of the lessor the lessee will furnish, on demand, so far as it has the means, all information necessary therefor.

237

And the parties hereto mutually agree that an inventory and appraisal of all the personal property hereby demised, including stocks and securities held by the lessor, shall be made as of the first day of March, 1893 by representatives of the lessor and lessee, or in case of disagreement as to any item or items by a third person to be agreed upon by the lessor and lessee.

Nothing herein contained shall prevent the lessor and lessee from modifying, changing, amending, annulling or cancelling this lease by mutual agreement.

238 *Exhibit A, Annexed to Petition of Old Colony Railroad Co. for Reorganization, Herein.*

It is understood that this lease is made subject to approval by the stockholders of said parties respectively as required by law.

IN WITNESS WHEREOF, the parties hereto, under the authority and direction of their respective Boards of Directors have caused this instrument to be signed by their respective Presidents and their corporate seals to be hereto affixed, this fifteenth day of February, A. D. 1893.

239 [L. S.].

OLD COLONY RAILROAD COMPANY,
CHARLES F. CHOATE, President.

[L. S.].

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
By CHARLES P. CLARK, President.

Witness:—E. G. Parker,
J. G. Parker.

240 (Verified by Charles F. Choate, as President of Old Colony Railroad Company and Charles P. Clark, President of The New York, New Haven and Hartford Railroad Company, on February 15, 1893.)

(j) Order Approving Petition of Old Colony Railroad Company for Reorganization Herein. 241

(Order No. 74.)

[SAME TITLE.]

Upon due consideration of the petition of Old Colony Railroad Company, verified June 2, 1936, and filed June 3, 1936, alleging among other things that it is a railroad corporation organized and existing under the laws of the Commonwealth of Massachusetts, owning and leasing railroads in that Commonwealth and in the State of Rhode 242
Island, that the Debtor herein owns a majority of the capital stock of the petitioner having power to vote for the election of directors; that the Trustees herein have continued since their qualification to conduct carrier operations over said lines of railroad owned or leased by the petitioner; that such operations have been carried on pursuant to orders No. 1 and No. 17 herein and are now carried on for the account of the petitioner; that the petitioner approves and agrees to the continued operation by said Trustees for its account; that the petitioner is confronted with current obligations in substantial amounts; that it is unable to meet its debts as they mature, and that the petitioner desires to effect a plan of reorganization in 243
connection with or as a part of the plan of reorganization of the Debtor herein, and the Court being satisfied that said petition complies with Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy as amended, and has been filed in good faith it is ORDERED:

1. That said petition be and it hereby is approved as properly filed under such Section 77.

2. That until further order the Trustees of the property of the Debtor continue to possess and to operate the peti-

244 *Order Approving Petition of Old Colony Railroad Co., for Reorganization Herein.*

tioner's property, such operation to be for the account of the petitioner with all the powers, rights, privileges, duties and obligations with respect to said property as have been heretofore granted to and imposed upon or required of them with respect to the property of the Debtor pursuant to any and all of the orders heretofore entered by this Court in this proceeding, and to preserve such basic information and keep such records and accounts in addition to the accounts prescribed by the Interstate Commerce Commission as will permit of such a segregation and alio-
245 cation as the necessities of the case may require between the petitioner's property and the remaining property under the administration of the Trustees.

3. That within sixty days after the entry of this order the petitioner shall file with the Clerk of this Court a statement of the assets and liabilities of petitioner as of the close of business on May 31, 1936.

4. That all persons, firms and corporations whatsoever, and wheresoever situated, located or domiciled, be and they hereby are restrained and enjoined from interfering with, seizing, converting, appropriating, attaching, gar-
246 nisheeing, levying upon, or enforcing liens upon, or in any manner whatsoever disturbing any portion of the assets, goods, money, deposit balances, credits, choses in action, interests, railroads, properties, or premises belonging to, or in the possession of the petitioner, or from taking possession of, or in any way interfering with the same, or any part thereof, or from interfering in any manner with the operation of its railroad or properties or the carrying on of its business under the orders of this Court, or from commencing or continuing any suits against the petitioner; provided, that suits or claims for damages caused by the operation of trains, busses, or other means of trans-

247

portation may be filed and prosecuted to judgment in any court of competent jurisdiction.

5. That all persons and corporations holding collateral, including deposit balances or credits, heretofore pledged by the petitioner as security for its notes or obligations be and each of them hereby is restrained and enjoined from selling, converting or otherwise disposing of such collateral, deposit balances or other credits, or any part thereof, until further order of this Court.

6. That the petitioner hereby is directed to give notice by mailing a copy of this order to its mortgage trustee and to cause a notice directed to its creditors and stockholders to be published within five days from the date of entry of this order once in The New Haven Journal Courier, a newspaper published in the City of New Haven, Connecticut, and in the Boston Herald, a newspaper published in the City of Boston, Massachusetts, and in the Providence Journal, a newspaper published in the City of Providence, Rhode Island, of a hearing to be held on June 18, 1936, at 2 D.S.T. o'clock in the Court Room occupied by this Court in the United States Court House, New Haven, Connecticut, at which hearing, or any adjournment thereof, the Court will appoint the present Trustees of the Debtor or some other suitable person or persons as Trustees of the property of the petitioner. The notice of such hearing shall be substantially in the form of the notice annexed hereto marked "Exhibit A". When such mailing and publication has been completed the petitioner shall file with the Clerk of this Court its report with respect thereto.

248

249

Enter:

CARROLL C. HINCKS,
District Judge.

Dated June 2, 1936.

250 EXHIBIT A, ANNEXED TO ORDER APPROVING PETITION OF OLD COLONY RAILROAD COMPANY FOR REORGANIZATION HEREIN.

NOTICE TO ALL CREDITORS AND STOCKHOLDERS

OF

OLD COLONY RAILROAD COMPANY

Pursuant to an order entered June 3, 1936, by the Honorable Carroll C. Hincks, Judge of the District Court of the United States for the District of Connecticut, notice is hereby given that a hearing will be held on June 18,
251 1936, at 2 o'clock P.M., D.S.T., by said Judge, in the courtroom usually occupied by him in the United States Court House, New Haven, Connecticut, at which hearing the Court will, pursuant to the provisions of Section 77 of the Act entitled: "An Act to establish a uniform system of bankruptcy throughout the United States", approved July 1, 1898, and acts amendatory thereof and supplementary thereto, appoint the trustees of the property of The New York, New Haven and Hartford Railroad Company, or some other suitable person or persons, as trustees of Old Colony Railroad Company.

252 OLD COLONY RAILROAD COMPANY

Dated at Boston, Massachusetts,
June 3, 1936.

(k) Order Appointing Trustees of Old Colony Railroad Company.

253

(Order No. 75.)

[SAME TITLE.]

The matter of the appointment of one or more trustees of the property of Old Colony Railroad Company, pursuant to the requirement of the amendment of August 27, 1935 to Section 77 of the Act of July 1, 1898, entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States", as amended, having come 254
on for hearing on June 18, 1936, and it appearing to the Court that Old Colony Railroad Company has given notice of this hearing as directed in the Court Order No. 74 of June 3, 1936, and the Court having heard the recommendations of counsel representing various parties in interest as to the personnel of the trustees, and the Court being of the opinion that the appointment of trustees herein should not disturb the continuity of operations of the railroad system of The New York, New Haven and Hartford Railroad Company as at present carried on by the trustees of that corporation and that the appointment of the Trustees of the New York, New Haven and Hart- 255
ford Railroad Company would best serve the interests of all parties in interest, it is ORDERED:

1. That Howard S. Palmer of New Haven, Connecticut, W. M. Daniels of New Haven, Connecticut, and James Lee Loomis of Granby, Connecticut, all being the Trustees of the property of The New York, New Haven and Hartford Railroad Company appointed by this Court, and each of those later named being a person who within one year prior to the date of this Order has not been an

256 officer, director, or employee of Old Colony Railroad Company, any subsidiary corporation, or any holding company connected therewith, be and they hereby are appointed Trustees of the property of Old Colony Railroad Company.

2. That the bond of each such Trustee be and it hereby is fixed at $10,000.00 conditioned to the effect that he will well and truly perform the duties of Trustee of the property of Old Colony Railroad Company and duly account for any money and property which may come into his
257 hands and abide by and perform all things which he shall be directed by the Court to do.

3. That this appointment shall become effective upon ratification thereof by the Interstate Commerce Commission.

4. That said Trustees shall within ten days after such ratification, execute and file with the Clerk of this Court such bonds, with sureties approved by said Clerk, for the benefit of whom it may concern.

5. That said Trustees shall have, following the quali-
258 fication of each of them by said ratification and by filing such bonds, all the title and shall exercise, subject to the control of this Court and consistently with the provisions of said Section 77, as amended, all the powers of trustees appointed pursuant to Section 44 of said Act or any other section of said Act, and, to the extent not inconsistent with said Section 77, as amended, the powers of receivers in an equity proceeding, and, subject to the control of this Court and the jurisdiction of the Interstate Commerce Commission as provided by the Interstate Commerce Act as now or hereafter amended, the power to operate the

259

usiness of Old Colony Railroad Company, and further,
at upon the qualification of said Trustees in the manner
foresaid, title to all of the property, real, personal and
ixed, or every kind and nature whatsoever, of Old
olony Railroad Company shall by this order be vested
said Howard S. Palmer, W. M. Daniels and James
e Loomis as Trustees of the property of Old Colony
ilroad Company.

260

. That, inasmuch as the public interest and the inter-
s of Old Colony Railroad Company and of The New
rk, New Haven and Hartford Railroad Company re-
re that, until the further order of the Court, the rail-
l lines and property of Old Colony Railroad Company
perated as an integral part of the system of railroads
being administered by the Trustees of The New
k, New Haven and Hartford Railroad Company, said
stees of The New York, New Haven and Hartford
road Company, as such, be and they hereby are
ted to continue to possess and operate the properties
ld Colony Railroad Company, such operation to be
he account of Old Colony Railroad Company or the
tees of its property. In connection with such opera-
(but subject to their obligation to account to Old
y Railroad Company or to themselves as the Trus-
f its property) said Trustees shall have the following
rs:

261

The power and authority to operate, maintain
epair the railroad and properties of Old Colony
ad Company, to manage its railroad business and
rry on the same through the officers, employees,
gents of the said Trustees of The New York, New
and Hartford Railroad Company; to collect the
ts, revenues, income, rents, profits, and tolls

262 accrued from its railroads and properties, and to the extent necessary to protect, preserve, and benefit its railroad or properties or business, to make and pay for additions thereto and betterments thereof.

(2) The power and authority from time to time until further order of this court to pay:

(a) all taxes and assessments due or to become due upon the properties, income, franchises, or business of Old Colony Railroad Company,

263 (b) all necessary current expenses of every description in operating the railroads and property, preserving the assets and conducting the business of Old Colony Railroad Company, including without limitation expenses of the various classifications enumerated in paragraph (3) subsections (b) (c) and (d) of Order No. 1 herein, so far as such expenses may be determined to be properly allocable to the property of Old Colony Railroad Company,

(c) such sums as may be necessary to comply with the obligations of every description of Old Colony Railroad Company under contracts or leases, but such payments shall not constitute affirmation of 264 such contracts or leases of any of them,

(d) such sums as may be necessary to maintain the corporate existence of Old Colony Railroad Company, including corporate franchise, stamp and similar taxes, the necessary expense of keeping and preserving corporate records, of maintaining transfer offices and agents, of registering and transferring its securities, and, to the extent of the liability of Old Colony Railroad Company therefor, of paying the proper charges and expenses of the trustee or trus-

265

tees under any indenture or mortgage pursuant to which securities of Old Colony Railroad Company have been issued.

The Trustees of The New York, New Haven and Hartford Railroad Company are expressly authorized, in connection with their operation of the said railroad lines and property of Old Colony Railroad Company as a part of the system of lines and properties heretofore operated by them, to mingle the funds, income, assets, equipment and other properties of Old Colony Railroad Company with the other property subject to their control and, except as otherwise expressly ordered by the Court and pending its further order, for the purposes of operation only, to deal with all the properties subject to their control as a single railroad system, but such Trustees shall preserve (and shall make reasonably available to Old Colony Railroad Company) all such basic information, particularly with respect to the operation of the property of Old Colony Railroad Company and to the railroad system, as a whole, now operated by said Trustees, and keep such records and accounts with respect thereto, in addition to the accounts prescribed by the Interstate Commerce Commission, as will permit of such a segregation and allocation under the direction of the Court, as the necessities of the case may from time to time require, between the property of Old Colony Railroad Company and the remaining property under the administration of the Trustees, including without limitation a segregation and allocation of revenues, income, expenses, property and equipment. In connection with the operation of the railroads and properties of Old Colony Railroad Company, and without limitation of any authority granted to them by this order, the Trustees of The New York, New Haven and Hartford Railroad Company are hereby ex-

266

267

268 pressly confirmed in the authority granted to them by Orders Nos. 24, 27, 39 and 49 in these proceedings so far as said orders may be applicable to the property of Old Colony Railroad Company.

7. That, without limitation of any powers, authority, or direction herein given to the Trustees of The New York, New Haven and Hartford Railroad Company, they are hereby specifically directed

269 (a) to pay on June 30, 1936 for the account of Old Colony Railroad Company, or of the Trustees of its property, the rent in the sum of one hundred thousand dollars ($100,000) payable on July 1, 1936 under the terms of a certain lease from Boston and Providence Railroad Corporation to Old Colony Railroad Company, dated April 7, 1888, and also on July 1, 1936 the sum of fifty-four thousand, two hundred and fifty dollars ($54,250), the interest then falling due under the provisions of said lease dated April 7, 1888 upon the 5% Debentures (maturing July 1, 1938) of Boston and Providence Railroad Corporation.

270 (b) to pay for the account of Old Colony Railroad Company forthwith, if the same has not been paid, the quarterly installment of federal income taxes of Old Colony Railroad Company due June 15, 1936 in the sum of sixty-one thousand six hundred and twenty-eight dollars and ninety cents ($61,628.90)

and the Trustees of The New York, New Haven and Hartford Railroad Company, either as such or as Trustees of Old Colony Railroad Company, shall not intentionally permit or make any default in the performance of the terms of any lease or executory contract to which

271

Old Colony Railroad Company is a party, or in making all payments due in accordance with any such lease or executory contract, unless and except upon the advice of and with the consent of this Court previously obtained upon petition and after hearing, notice of which hearing shall have been given to all interested parties (as the Court may direct) more than twenty days prior to such hearing.

8. That, following said ratification and upon filing such bonds the said Trustees as Trustees of Old Colony Railroad Company shall by this order have authority and power to designate employees of Old Colony Railroad 272
Company or of The New York, New Haven and Hartford Railroad Company to execute and deliver in their stead and as their agents checks, drafts, vouchers, orders, contracts and any or all instruments incidental to their duties or to the operation of the property of Old Colony Railroad Company, and that such instruments, so executed by the agents of said Trustees shall bind said Trustees to the same extent as though their signatures respectively had been affixed thereto.

9. That the Trustees of Old Colony Railroad Company in their discretion, but only with the advice and consent 273
of this Court previously obtained upon petition and after hearing notice of which shall have been given to all interested parties (as the Court may direct) more than twenty days prior thereto, at any time prior to November 15, 1936, or prior to such other day as may be provided by further order of this Court, may disaffirm any of the existing contracts or leases of Old Colony Railroad Company. Such disaffirmance of any such contract or lease shall be effective when notice of such disaffirmance, together with proof of service or mailing of a copy or copies

thereof by registered mail to the other party or parties to such lease or contract shall be filed of record in this proceeding. The performance by Old Colony Railroad Company, or by the Trustees of its property, or by the Trustees of The New York, New Haven and Hartford Railroad Company for the account of Old Colony Railroad Company, of any such contract or lease within said period or further periods allowed for disaffirmance thereof shall not constitute or be evidence of the adoption or acceptance of such contract or lease by Old Colony Railroad Company or by the Trustee of its property or the
275 waiver by it or him of its or his right to disaffirm the same. In case payments are made pursuant to the authority granted to Old Colony Railroad Company or the Trustees of its property by the terms of this order, or by the terms of any other order in these proceedings, to comply with the obligations of Old Colony Railroad Company under leases or executory contracts and such leases or executory contracts shall be subsequently affirmed and adopted by Old Colony Railroad Company or by the Trustees of its property, or pursuant to a plan of reorganization, said payments shall be deemed to have been made on account of the rental or other payments due from Old Colony Railroad Company under such leases or executory contracts as the case may be. In case such leases
276 shall be disaffirmed or rejected by Old Colony Railroad Company or by the Trustees of its property, or under a plan of reorganization, the operation of the leased properties shall have been and said payments shall be deemed to have been made for the account of the lessor, and such payment shall be recovered, set-off, or made and charged, on the earnings and properties of the lessor, prior to any mortgage or other lien thereon by such method as the Court shall determine, and further reserving all rights and equities of the parties arising from such payments.

277

In case any such executory contract shall be disaffirmed or rejected by Old Colony Railroad Company or by the Trustees of its property or under a plan of reorganization any payment made under any such executory contract or services performed thereunder shall be the basis of such recovery, set-off, or charge against the other contracting party or parties as the Court shall determine to be proper under all the circumstances.

10. That this Court reserves full right and jurisdiction to make, from time to time, such additional orders herein as the Court may deem proper, as well as any orders amending, extending, limiting, modifying, or otherwise changing this order, and in all respects to regulate and control the conduct of said Trustees.

278

11. That the Clerk of this Court forthwith transmit to the Interstate Commerce Commission, Washington, D. C., a certified copy of this order and a copy of the stenographic minutes of said hearing of June 18, 1936, to the end that said Interstate Commerce Commission may determine upon the ratification of the appointments hereby designated and may, at its convenience, file with this Court its determination thereon.

Enter:

279

CARROLL C. HINCKS,
District Judge.

Dated, June 18th, 1936.

280

(l) Order No. 140.

This order is dated February 24, 1937 and by it th Court relieved W. M. Daniels of his trusteeship.

(m) Order Appointing an Additional Trustee of the Property of the Principal Debtor, Old Colony Railroad Company, and Hartford and Connecticut Western Railroad Company.

(Order No. 149.)

281

[SAME TITLE.]

This order is dated March 10, 1937 and reads in part as follows:

"That Henry B. Sawyer of Boston, Mass., be and he hereby is appointed as one of the three Trustees of the property of the Principal Debtor, of Old Colony Railroad Company and of Hartford and Connecticut Western Railroad Company to succeed

282 W. M. Daniels who was relieved of further duty by Order No. 140 herein dated February 24, 1937."

(n) Report and Recommendation of the Interstate Commerce Commission as to Method or Formula for the Segregation and Allocation of Earnings and Expenses of The New York, New Haven and Hartford Railroad Company. 283

This report reads in part as follows:

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 10992
New York, New Haven and Hartford Railroad Company Reorganization

284

Submitted March 4, 1938 Decided April 9, 1938

METHOD OR FORMULA FOR THE SEGREGATION AND ALLOCATION OF THE EARNINGS AND EXPENSES OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR, BETWEEN AND TO ITS VARIOUS MORTGAGED AND LEASED LINES, RECOMMENDED.

* * * * * * * * *

"After considering all available data as well as the criticisms thereof, we find that the trustees' 285
method of segregation and allocation of the debtor's revenues and expenses between and to its various mortgaged and leased lines is as fair and equitable as the circumstances will permit, and so recommend to the court.

"By the Commission, division 4."

286 **(o) Order Confirming and Accepting Report of the Interstate Commerce Commission (Finance Docket No. 10992) Made April 9, 1938 on Segregation of System Earnings and Expenses.**

(Order No. 283.)

[SAME TITLE.]

These proceedings have come on further duly to be heard on May 24, 1938 upon the petition of Bankers Trust
287 Company, as Trustee, verified October 6, 1937 (Petition for Order No. 217) (Printed Record, 3263); and no exceptions having been filed to the findings and recommendation of the Interstate Commerce Commission embodied in its Report dated April 9, 1938 and filed with this Court April 15, 1938 (Printed Record, 4241); and all parties having been heard or given opportunity to be heard; Now, after due deliberation the Court, being fully advised in the premises, hereby:

FINDS, ORDERS, ADJUDGES AND DECREES:

That the findings and recommendation of the Interstate
288 Commerce Commission embodied in its Report dated April 9, 1938 and filed with this Court April 15, 1938 (Printed Record, 4241) be and they hereby are confirmed and accepted.

Dated, May 25, 1938.

ENTER:

CARROLL C. HINCKS,
District Judge.

(p) Report of Administration of Property of Old Colony Railroad Company and of Providence, Warren and Bristol Railroad Company up to and Including December 31, 1937. 289

[SAME TITLE.]

Now come Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, as the Trustees of the property of the Principal Debtor herein, and respectfully represent:

1. By paragraph 3, subparagraph (b) of Order No. 1 entered herein October 23, 1935, the Principal Debtor (hereinafter called the Debtor) was authorized to pay such sums as might be necessary to comply with its obligations under contracts or leases, but said Order provided that such payments should not constitute affirmations of such contracts or leases or any of them. By paragraph 4 of said Order the Debtor was authorized, at any time prior to April 23, 1936 or prior to such other date as might be provided by further order of the Court, to reject any of its existing contracts or leases, and it was ordered that the performance by the Debtor of any such contract or lease within said period or future periods allowed for rejection thereof should not constitute or be evidence of the adoption or assumption of such contract or lease by the Debtor or of the waiver by it of its right to reject the same. By subsequent orders the rights and powers granted to the Debtor by Order No. 1 were conferred upon the Trustees of its property with like force and effect as though said Trustees were therein specifically named in place of the Debtor. 290 291

2. Order No. 17, entered herein on November 30, 1935, amended Order No. 1 to provide, *inter alia*, that in case

292 payments were made pursuant to the authority granted in paragraph 3, sub-paragraph (b) of said Order No. 1, to comply with the obligations of the Debtor under leases, and such leases should be disaffirmed or rejected by the Debtor or such Trustees of its property as might thereafter qualify, or under a plan of reorganization, "the operation of the leased properties shall have been and said payments shall be deemed to have been made for the account of the lessors, and such payments shall be recovered, set-off, or made and charged, on the earnings and or
293 properties of the lessors prior to any mortgage or other lien thereon, by such method as the Court shall determine and further reserving all rights and equities of the parties arising from such payments."

3. By Order No. 56 the time within which leases of the Debtor might be rejected was extended to October 23, 1936.

4. On June 1, 1936 formal notice was given to Old Colony Railroad Company (hereinafter called Old Colony) of the rejection of the lease dated February 15, 1893 from Old Colony to the Debtor.

294

5. On June 3, 1936 Old Colony filed its petition (No. 74) for reorganization herein, reciting the terms of the aforesaid Orders No. 1 and No. 17 with respect to the operation of leased property and to payments made under any lease subsequent to October 23, 1935, alleging as follows:

> "That the petitioner is entitled under the provisions of said lease to re-enter upon the demised premises and the same have and possess as of its

295

former estate without prejudice to its right of action for arrears of rent or breach of covenant, but that the petitioner has no funds, no equipment and no organization which would enable it to resume operation on a separate basis; that said re-entry is now impracticable and contrary to the public interest and would entail irreparable loss and damage to the petitioner and its security holders; that the petitioner could at best only accomplish a technical resumption of separate operation by agreement with said Trustees; that the petitioner's lines of railroad are already being operated by said Trustees 296
pursuant to the orders of this Court; that said lines and those of the Debtor are now operated as integral parts of one railway system, and the problems of operation and administration of the property of the Debtor and that of the petitioner are now so closely interrelated that the interests of the petitioner and its security holders will be best conserved by the continuance of unified operation by said Trustees under the supervision of this Court pending the reorganization of the Debtor or the further order of this Court; that the petitioner approves and agrees to such operation of its prop- 297
erty by said Trustees for the petitioner's account until further notice."

raying, *inter alia*, as follo

"That the Trustees of th operty of the Debtor herein be authorized and directed to continue until further order to operate the petitioner's property for the account of the petitioner . . ."

urt by its Order No. 74, entered upon this petition, the Trustees of the property of the Debtor

298 continue to possess and operate the property of Old Colony for its account.

6. By Order No. 75 the Court appointed Trustees of the property of Old Colony, but directed the Trustees of the property of the Debtor to continue to possess and operate the properties of Old Colony, such operation to be for the account of Old Colony or the Trustees of its property. By said order the Trustees of the property of the Debtor were expressly authorized, in connection with
299 their operation of the railroad lines and property of Old Colony as a part of the system of lines and properties theretofore operated by them, to mingle the funds, income, assets, equipment and other properties of Old Colony with the other property subject to their control, and, except as otherwise expressly authorized by the Court and pending its further order, for the purposes of operation only, to deal with all the properties subject to their control as a single railroad system. Order No. 75 directed the Trustees of the property of the Debtor to preserve all such basic information, particularly with respect to the operation of the property of Old Colony and to the railroad system, as a whole, and to keep such records and
300 accounts with respect thereto as would permit of such a segregation and allocation under the direction of the Court as the necessities of the case might from time to time require, between the property of Old Colony and the remaining property under the administration of the Trustees of the property of the Debtor, including without limitation a segregation and allocation of revenues, income, expenses, property and equipment.

7. Order No. 75 contained provisions with respect to contracts and leases of Old Colony corresponding to the

301

provisions of Orders No. 1 and No. 17 as set forth in paragraphs 1 and 2 herein.

8. By Order No. 116 herein the Court authorized and directed the Trustees of the property of Old Colony to reject the lease dated December 1, 1891 from Providence, Warren and Bristol Railroad Company (hereinafter called the Bristol) to Old Colony. On February 11, 1937 formal notice was given to the Bristol of the rejection of said lease.

9. On February 12, 1937 the Bristol filed its petition (No. 138) for reorganization herein, reciting the terms of the aforesaid Orders No. 1, No. 17 and No. 75 with respect to the operation of leased property and to payments made under any lease subsequent to October 23, 1935, alleging as follows:

302

"That After default the petitioner is entitled under the provisions of said lease to re-enter upon the demised premises and the same have and possess as of its former estate without prejudice to its right of action for arrears of rent or breach of covenant, but that the petitioner has no funds, no equipment and no organization which would enable it to resume operation on a separate basis; that said re-entry is impracticable and contrary to the public interest and would entail irreparable loss and damage to the petitioner and its security holders; that the petitioner could at best only accomplish a technical resumption of separate operation by agreement with said Trustees; that the petitioner's lines of railroad are being operated by said Trustees pursuant to the orders of this Court; that said lines

303

304 and those of the Debtors herein are now operated as integral parts of one railway system, and the problems of operation and administration of the property of the Debtors and that of the petitioner are now so closely inter-related that the interests of the petitioner and its security holders will be best conserved by the continuance of unified operation by said Trustees under the supervision of this Court pending the reorganization of the Debtors herein or the further order of this Court; that the 305 petitioner approves and agrees to such operation of its property by said Trustees for the petitioner's account until further notice."

and praying, *inter alia*, as follows:

"That the Trustees of the property of the Principal Debtor herein be authorized and directed to continue until further order to operate the petitioner's property for the account of the petitioner . . . ."

The Court by its Order No. 138, entered upon this petition, ordered the Trustees of the property of the Debtor 306 to continue to possess and operate the property of the Bristol for its account.

10. By Order No. 150 the Court appointed Trustees of the property of the Bristol, but directed the Trustees of the property of the Debtor to continue to possess and operate the properties of the Bristol, such operation to be for the account of the Bristol or the Trustees of its property. By said order the Trustees of the property of the Debtor were expressly authorized, in connection with their operation of the railroad lines and property of the

307

Bristol as a part of the system of lines and properties theretofore operated by them, to mingle the funds, income, assets, equipment and other properties of the Bristol with the other property subject to their control, and, except as otherwise expressly authorized by the Court and pending its further order, for the purposes of operation only, to deal with all the properties subject to their control as a single railroad system. Said Order No. 150 directed the Trustees of the property of the Debtor to preserve all such basic information, particularly with respect to the operation of the property of the Bristol and to the railroad system as a whole, and to keep such records and accounts with respect thereto as would permit of such a segregation and allocation under the direction of the Court as the necessities of the case might from time to time require, between the property of the Bristol and the remaining property under the administration of the Trustees of the Debtor, including without limitations a segregation and allocation of revenues, income, expenses, property and equipment.

308

11. The Debtor and the Trustees of its property have continued to operate the properties of the aforesaid subsidiary debtors for their account, as directed by the aforesaid orders, have made certain capital expenditures upon said properties, and have made certain tax and other payments as authorized by this Court, including payments under the leases from Boston and Providence Railroad Corporation to Old Colony, dated April 7, 1888, and from the Bristol to Old Colony, dated December 1, 1891.

309

12. Pursuant to the suggestion of the Court at the continued hearing on Petition for Order No. 217, on December 23, 1937, petitioners have prepared accounts of their

administration of the properties of said subsidiary debtors from October 23, 1935 up to and including December 31, 1937, which said accounts are hereto annexed, made a part hereof, and marked Exhibits 1 and 2, the former consisting of a Summary of Accounts covering Administration of the Property of Old Colony Railroad Company (with statements marked A, B and C attached) the latter consisting of a Summary of Accounts covering Administration of the Property of Providence, Warren & Bristol Railroad Company (with statement marked A attached).

311 Said exhibits have been prepared from records and accounts prepared and kept by petitioners pursuant to orders herein.

13. The charges stated in said accounts for sums paid to or for the account of Old Colony, prior to rejection of leases, for the expenditures for additions and betterments, and the net credits for property retired and not replaced are drawn from the current accounts of petitioners. The revenues and expenses of operation of the properties from June 1, 1936 to December 31, 1937 have been credited or charged, as the case may be, on the basis of the formula referred to the Interstate Commerce Commission

312 by Order of Reference on Petition for Order No. 217, herein, and approved by the Commission's report and recommendation dated April 9, 1938. Expenses for the period prior to June 1, 1936 have been charged on the basis of said formula. Because of the time required and the expense to the estates of the several debtors that would be incurred in examining all waybills and passenger collections for the period prior to June 1, 1936, revenues for that period have been credited on the basis of tests and averages which petitioners believe reasonably approxi-

313

ate the result of applying the formula to revenues for hat period.

WHEREFORE, petitioners pray that the Court approve he accounts and order that the amounts stated therein onstitute a charge on the earnings and/or properties said subsidiary debtors prior to any mortgage or other en thereon as expenses of administration and may be covered out of the earnings and/or properties of Old olony Railroad Company and Providence, Warren and istol Railroad Company by such method as the Court all hereafter determine, said accounts to be subject to h adjustments as the Court may hereafter order.

314

Dated, April 19, 1938.

H. S. PALMER
JAMES LEE LOOMIS
HENRY B. SAWYER.
Trustees.

(Verification omitted in printing.)

315

EXHIBIT 1, ANNEXED TO REPORT OF ADMINISTRATION OF PROPERTY, ETC.

HOWARD S. PALMER, JAMES LEE LOOMIS, HENRY B. SAWYER, TRUSTEES.

IE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR

RY OF ACCOUNTS COVERING ADMINISTRATION OF THE PROPERTY OF OLD COLONY RAILROAD COMPANY

		Old Colony.	Boston & Providence	Providence Warren & Bristol	Total
Under Lease Obligations	(Statement A)	$ 817,157	$1,178,000	$ 27,533	$ 2,022,690
Expenditures (Net)	(Statement B)	38,577	117,295	35	155,907
Total Expenditures		855,734	1,295,295	27,568	2,178,597
g Deficits	(Statement C)	4,419,179	1,896,981	96,098	6,412,258
Total including Operating Deficits		5,274,913	3,192,276	123,666	8,590,855
for handling Company Coal and Interest avestment in Equipment and Other Facilities not included in above Operating Deficits	(Statement C)	500,737	2,269,175	33,755	2,803,667
GRAND TOTAL		$5,775,650	$5,461,451	$ 157,421	$11,394,522

olony and Boston & Providence for period October 24, 1935 to December 31, 1937.

dence, Warren & Bristol for period October 24, 1935 to June 3, 1936.

(Statements A, B and C omitted in printing)

EXHIBIT 2, ANNEXED TO REPORT OF ADMINISTRATION OF PROPERTY, ETC.

HOWARD S. PALMER, JAMES LEE LOOMIS, HENRY B. SAWYER, TRUSTEES.

HE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR

Y OF ACCOUNTS COVERING ADMINISTRATION OF THE PROPERTY OF PROVIDENCE, WARREN & BRISTOL RAILROAD COMPANY FOR THE PERIOD JUNE 4, 1936 TO DECEMBER 31, 1937.

UNDER LEASE OBLIGATIONS:

Date Paid	Detail	Period Covered	Amount
June 29, 1936	Dividend on 1,500 shares Preferred and 7,246 shares Common @ 6%	7-1-35—12-31-35	$ 26,238.00

XPENDITURES:

A. F. E. No.	Location	Description	Gross Expenses	Operating Expense Ledger Value Retirement	
30918	P. W. & B. Branch	1937 Rail Program	$ 5,876.13		5,876.13
ial Expenditures					5,876.13
Deficits (Statement A)					32,114.13
					277,986.45
al including Operating Deficits					309,200.58
handling Company Coal and Interest					
stment in Equipment and Other Facili-					
included in above Operating Deficits					
ent A)					85,314.64
ND TOTAL					$394,515.22

Conn.
38.

(Statement A omitted in printing)

322 **(q) Order on Trustees' Report of Administration of Property of Old Colony Railroad Company and of Providence, Warren and Bristol Railroad Company up to and Including December 31, 1937.**

(Order No. 300.)

[SAME TITLE.]

The Trustees of the property of the Principal Debtor herein having filed a report dated April 19, 1938 of their administration of the property of Old Colony Railroad
323 Company and of Providence, Warren and Bristol Railroad Company from October 23, 1935, when these proceedings were instituted, up to and including December 31, 1937, and said report having come on for hearing duly noticed and the Court having considered the facts and arguments presented and having issued its Memorandum of Decision dated July 2, 1938, and the Court upon petition of Boston and Providence Railroad Corporation having, on July 15, 1938, reopened the record of fact and said Boston and Providence Railroad Corporation, said Trustees, and the Trustee under The New England Railroad Company Consolidated Mortgage
324 having presented additional evidence and having been heard upon questions relating to the methods employed by the Trustees of the property of the Principal Debtor in determining the rights of the Boston and Providence, under the provisions of Order No. 221 herein, in certain freight facilities in Boston and vicinity, and due notice of the settlement of this order having been given, it is

ORDERED, ADJUDGED AND DECREED:

1. That the accounts as stated in said report be and they hereby are approved in the amount of $11,789.

325

37.22, viz.: (a) $5,775,650, covering administration f the property of Old Colony Railroad Company for the eriod October 24, 1935 to December 31, 1937 (both ates inclusive); (b) $5,461,451, covering administra- ion of the property of Boston and Providence Railroad Corporation for the same period; and (c) $551,936.22, overing administrat of the property of Providence, Warren and Bristol road Company for the same eriod.

2. That $11,237,401.22 of said amount be and it hereby 326
onstitutes a lien, charge or claim on the earnings and roperty of Old Colony Railroad Company as an expense f administration prior to any mortgage or other lien hereon and to any other indebtedness of said Company, nd may be recovered by the Trustees of the property of he Principal Debtor herein out of the earnings or property f said Old Colony Railroad Company by such method as he Court shall hereafter determine.

3. That the incidence of the $551,936.22 for administra- ion of the property of Providence, Warren and Bristol Railroad Company be and it hereby is reserved for later determination. 327

4. That the question of interest upon said amounts be nd it hereby is reserved for later determination.

Enter.

C. C. HINCKS,
District Judge.

Dated; July 18th, 1938.

328 **(r) Order on Petition of Bankers Trust Company, as Trustee, for Order No. 217.**

(Order No. 217.)

[SAME TITLE.]

These proceedings having come on further duly to be heard on May 24 and 25 and June 2, 1938 upon the petition of Bankers Trust Company, as Trustee, verified October 6, 1937 (Petition for Order No. 217) (R. p. 3263), and upon all relevant pleadings or other papers filed or
329 orders entered or other proceedings had or taken with regard thereto, including (without limiting the generality of the foregoing) the method or formula embodied in a volume prepared by the Trustees of the property of the Principal Debtor entitled "New York, New Haven and Hartford Railroad Segregation of Earnings" (herein called the "Formula"), the order of reference dated October 29, 1937 entitled "Order of Reference to Interstate Commerce Commission for its Recommendation as to the Method or Formula by which Earnings of the Railroad System shall be Segregated and Allocated" (R. p. 3587), the Report of the Commission made April 9, 1938 and
330 filed with this Court on April 15, 1938 (R. p. 4241), the answer dated May 3, 1938 of the Trustees of the property of the Principal Debtor and the Trustees of the property of Old Colony Railroad Company recommending "that they be authorized and directed (a) to withhold any and all payments due or to become due under the terms of the Lease dated April 7, 1888 from Boston and Providence Railroad Corporation to Old Colony Railroad Company and (b) to reject said Lease" (R. p. 4309), and the order of the Court heretofore entered approving and adopting the Formula and the Report of the Interstate Commerce Com-

331

mission with respect thereto (R. p. 4241); and all parties having been heard or given opportunity to be heard; and the Court having entered its Decision dated July 2, 1938 entitled "Memorandum of Decision on Petition for Order No. 217 and the Trustees' Answer Thereto" (R. p. 4497); and Boston and Providence Railroad Corporation having on July 8, 1938 filed its Petition for Order No. 296 to reopen the record of fact herein, which petition was not pressed and was orally denied without exception at a hearing on July 15, 1938;

332

Now, after due deliberation, the Court being fully advised in the premises, hereby:

ORDERS, ADJUDGES AND DECREES:

1. The Trustees of the property of Old Colony Railroad Company (herein called the "Old Colony Trustees") shall forthwith disaffirm and reject the Lease dated April 7, 1888 from Boston and Providence Railroad Corporation (herein called the "Boston and Providence") to Old Colony Railroad Company (herein called the "Old Colony"). Notice of such disaffirmance and rejection shall be sufficient if sent by United States registered mail in a 333
securely sealed postpaid wrapper addressed to the Boston and Providence, c/o Bentley W. Warren, Esq., at 30 State Street, Boston, Massachusetts.

2. Promptly after mailing such notice, the Old Colony Trustees shall file with this Court a Report of such mailing.

3. Neither the Old Colony Trustees shall make, nor the Trustees of the property of the Principal Debtor

334 (herein called the "New Haven Trustees") shall make for the account of the Old Colony or of the Old Colony Trustees, any further payments under the terms of the Lease dated April 7, 1888 from the Boston and Providence to the Old Colony; nor shall the estate of the Principal Debtor be subjected to further outlay on account of said Lease.

4. If and to the extent that any provisions contained in Order No. 75 (R. p. 817) or any provisions contained
335 in any other orders entered herein prior to the date of this order are inconsistent with the foregoing provisions of this order, such inconsistent provisions are terminated.

5. Pending further order of Court the operation of the property of Boston and Providence for the account of that corporation shall be continued pursuant to subdivision (c) (6) of Sec. 77 of the Bankruptcy Act, and since the Old Colony Railroad Company, as lessee of Boston and Providence, and likewise the Old Colony Trustees, are wholly without any operating organization, the operation of Boston and Providence properties shall be conducted by the New Haven Trustees in behalf and for
336 the account of the Old Colony estate but without expense to the New Haven estate.

The Court reserves for further hearing the right to determine the existence and amount of any obligation of Boston and Providence arising out of operation of its property or payments made to it or on its behalf prior to the rejection of its lease, and the liability of the Boston and Providence therefor to the Old Colony estate and by way of subrogation to the New Haven estate. And pend-

337

g such determination the Court will withhold its final
ling on Petition for Order No. 276.

Enter,

C. C. HINCKS,
District Judge.

ated: July 19th, 1938.

338

) Report of Mailing of Notice of Rejection of Lease Dated April 7, 1888 from Boston and Providence Railroad Corporation to Old Colony Railroad Company.

This report of mailing dated July 19, 1938 reads in part follows:

"That pursuant to authority granted in Order No. 217 herein, said Trustees [i. e. the Old Colony Trustees] have given notice to Boston and Providence Railroad Corporation of the rejection of the unexpired lease dated April 7, 1888 from Boston and Providence Railroad Corporation to Old Colony Railroad Company."

339

340 **(t) Petition of Trustees for a Charge Upon the Earnings and Property of Boston and Providence Railroad Corporation for Administration for the Period June 4, 1936 to December 31, 1937.**

(Petition for Order No. 301.)

[SAME TITLE.]

Now come Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, as the Trustees of the property of the Principal Debtor (hereinafter sometimes called "the New
341 Haven Trustees") and of Old Colony Railroad Company (hereinafter sometimes called "the Old Colony Trustees"), and respectfully represent:

1. By Order No. 74 entered herein June 3, 1936, the petition of Old Colony Railroad Company for reorganization herein was approved and the New Haven Trustees were ordered until further order to continue to operate the property of said Old Colony Railroad Company for its account.

2. By paragraph 2, subparagraph (c), of Order No. 75 entered herein June 18, 1936 said New Haven Trus-
342 tees were empowered and authorized to pay such sums as might be necessary to comply with the obligations of Old Colony Railroad Company under contracts or leases, but that such payments should not constitute affirmation of such contracts or leases or any of them, and by paragraph 7 of said Order it was provided that said Trustees, either as such or as Old Colony Trustees, should not intentionally make or permit any default in the performance of any contract or lease to which Old Colony Railroad Company was a party unless and except upon the advice and with the consent of the Court previously obtained

Petition of Trustees for a Charge Upon the Earnings and Property of Boston and Providence Railroad Corp., etc. 343

fter hearing duly noticed. By paragraph 9 of said Order
he Old Colony Trustees were authorized at any time
rior to November 15, 1936 or prior to such other day
s might be provided by further order of the Court, and
ith the advice and consent of the Court after hearing
ly noticed, to reject any of the existing contracts or
ases of said Old Colony Railroad Company; and it was
rther provided in said paragraph 9 that the perform-
nce by Old Colony Railroad Company, by the Old Colony
rustees or by the New Haven Trustees for the account
Old Colony Railroad Company, of any such contract 344
lease within said period or future periods allowed for
jection should not constitute or be evidence of the
doption or acceptance of such contract or lease by Old
olony Railroad Company or by the Old Colony Trus-
es, or the waiver of the right to disaffirm or reject the
me, and that in case payments were made pursuant to
he authority granted by the terms of said order or of
ny other order in the proceeding, to comply with the
bligations of said Old Colony Railroad Company under
ases and such leases should be subsequently disaffirmed
rejected by Old Colony Railroad Company or by the
ld Colony Trustees or under a plan of reorganization,
the operation of the leased properties shall have been 345
nd said payments shall be deemed to have been made
r the account of the lessor, and such payment shall be
ecovered, set-off, or made and charged, on the earnings
nd properties of the lessor, prior to any mortgage or
her lien thereon by such method as the Court shall
etermine, and further reserving all rights and equities
f the parties arising from such payments." Boston and
rovidence Railroad Corporation, its officers, agents and
ounsel have had knowledge of the said terms of Order
o. 75 continuously since its entry.

346 3. By Orders No. 97, 125, 148, 167, 198, 205, 213, and 221A the time within which leases of Old Colony Railroad Company might be rejected was extended from time to time, the last of said orders, entered October 27, 1937, extending the time until further order of the Court. Boston and Providence Railroad Corporation, its officers, agents and counsel have had knowledge of the terms of said orders continuously since their entry.

4. By Order No. 267 the Court after hearing duly noticed, granted the petition of the petitioners herein to
347 permit postponement of the payment due April 1, 1938 under the lease from Boston and Providence Railroad Corporation to Old Colony Railroad Company, dated April 7, 1888, during the grace period of thirty days stipulated in said lease. By Order No. 271, upon petition of the petitioners herein alleging that they had received assurances from the President of Boston and Providence Railroad Corporation that prior to the expiration of said grace period the Board of Directors of said Corporation would authorize him to agree with Old Colony Railroad Company and the Old Colony Trustees that if said payment due April 1, 1938 was not made within said grace
348 period said Corporation would not claim any right of reentry or of forfeiture of said lease prior to June 1, 1938, the Court, after notice and hearing, permitted further postponement until June 1, 1938 of said payment due April 1, 1938. By Order No. 284 upon oral motion in open Court of counsel for petitioners herein at the hearing May 25, 1938 upon Petition for Order No. 217 and upon assurance from the President of Boston and Providence that said Corporation had consented to claim no right of reentry or forfeiture prior to July 1, 1938 for delay in the payment due April 1, 1938, the Court permitted

349

ther postponement until July 1, 1938 of said payment. Order No. 292 the Court authorized and directed the itioners herein to withhold any and all payments due to become due under the aforesaid lease pending entry the Court's order upon Petition for Order No. 217.

. By Order No. 217, entered herein on July 19, 1938, Court ordered the Old Colony Trustees forthwith to ect the lease dated April 7, 1888 from Boston and ovidence Railroad Corporation to Old Colony Railroad npany.

350

. Pursuant to said Order No. 217 said Old Colony ustees mailed on July 19, 1938 to Boston and Provi- ce Railroad Corporation notice of their rejection of l lease, and on the same day said Trustees filed with s Court a report of such mailing.

. By Order No. 300, entered herein on July 18, 1938, Court approved the New Haven Trustees' report ed April 19, 1938 of administration of property of Old ony Railroad Company from October 23, 1935 when se proceedings were instituted up to and including cember 31, 1937, and ordered that the amount of ,237,101.22 constitutes a charge on the earnings and perty of Old Colony Railroad Company as an expense administration prior to any mortgage or other lien reon and to any other indebtedness of said Company may be recovered by the New Haven Trustees out the earnings or property of said Old Colony Railroad npany by such method as the Court shall hereafter ermine.

351

. Said amount included $3,955,298.93 covering pay- nts made under the aforesaid lease and expenditures

352

incurred in administration of property of Boston and Providence Railroad Corporation during the period June 4, 1936 to December 31, 1937 (both dates inclusive), as follows:

Payments under lease obligations	$ 922,250.00
Net capital expenditures	56,824.31
Operating deficits	1,355,565.40
Charges for handling company coal and interest on investment in equipment and other facilities	1,620,659.22
Total	$3,955,298.93

353

9. The detail making up said $3,955,298.93 is as shown on Old Colony Exhibit #2 introduced at the hearing May 24, 1938 upon the aforesaid report of the New Haven Trustees dated April 19, 1938, copy of the pertinent parts of which exhibit is hereto annexed marked Exhibit A and made a part hereof.

10. Petitioners propose to submit their report of administration of the property of Boston and Providence Railroad Corporation during the period January 1, 1938 to the date of rejection as soon as the figures are available.

354

WHEREFORE, petitioners pray that the Court approve said account against the Boston and Providence Railroad Corporation for the period June 4, 1936 to December 31, 1937, and order that said $3,955,298.93 with such interest thereon as is later determined to be payable constitute a lien and charge on the earnings and property of Boston and Providence Railroad Corporation in the possession of this Court prior to any mortgage or other lien, charge

said Company as an expense of administration of said property of said Company by the Trustees of the property of the Principal Debtor herein on behalf and for the account of the Trustees of the property of Old Colony Railroad Company, and may be recovered by said Trustees of the property of Old Colony Railroad Company or, in the alternative, by the Trustees of the property of the Principal Debtor out of the earnings and property of said Boston and Providence Railroad Corporation by such method as the Court shall hereafter determine, and that to the extent that said amount is so recovered by said Trustees of the property of the Principal Debtor the like charge against the earnings and property of Old Colony Railroad Company heretofore allowed by Order No. 300 shall be correspondingly reduced, and that the Court reserve for later determination the amount of like charges covering administration of the property of said Boston and Providence Railroad Corporation from January 1, 1938 to the date of rejection of the aforesaid lease.

Dated: July 27, 1938.

H. S. PALMER
JAMES LEE LOOMIS
HENRY B. SAWYER
Trustees.

W. W. MEYER,
Counsel for Trustees.

(Verification omitted in printing.)

EXHIBIT A, ANNEXED TO PETITION OF TRUSTEES, ETC.

Howard S. Palmer, James Lee Loomis, Henry B. Sawyer, Trustees of the property of THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR, and of OLD COLONY RAILROAD COMPANY, DEBTOR.

EXCERPTS FROM OLD COLONY EXHIBIT #2 DATED MAY 17, 1938 FILED AT HEARING ON TRUSTEES' REPORT OF ADMINISTRATION OF OLD COLONY RAILROAD—MAY 24, 1938.

Statement of Payments made by Trustees to comply with Obligations under Lease dated February 15, 1893 from Old Colony Railroad Company to The New York, New Haven & Hartford Railroad Company.

BOSTON & PROVIDENCE RAILROAD CORPORATION LEASE dated April 7, 1888 to Old Colony Railroad Company

FOR THE PERIOD JUNE 4, 1936 TO DECEMBER 31, 1937

Detail				Period Covered			Gross Amount
Div. on	40,000	shares	stock @ 10%	4–1–36	—	6–30–36	$100,000.00
" "	40,000	"	" " 10%	7–1–36	—	9–30–36	100,000.00
" "	40,000	"	" " 10%	10–1–36	—	12–31–36	100,000.00
" "	40,000	"	" " 10%	1–1–37	—	3–31–37	100,000.00
" "	40,000	"	" " 10%	4–1–37	—	6–30–37	100,000.00
" "	40,000	"	" " 10%	7–1–37	—	9–30–37	100,000.00
" "	40,000	"	" " 10%	10–1–37	—	12–31–37	100,000.00
Int. on	$2,170,000	5%	Debs. due 1938	1–1–36	—	6–30–36	54,250.00
" "	$2,170,000	5%	" " 1938	7–1–36	—	12–31–36	54,250.00
" "	$2,170,000	5%	" " 1938	1–1–37	—	6–30–37	54,250.00
" "	$2,170,000	5%	" " 1938	7–1–37	—	12–31–37	54,250.00
Miscellaneous Organization Expenses				12–31–35	—	12–31–37	5,250.00
Total June 4, 1936 to December 31, 1937							$922,250.00

Summary of Net Capital Expenditures and of Net Salvage

361

BOSTON AND PROVIDENCE

June 4, 1936 to December 31, 1937

Net Capital Expenditures	$63,743.39
Net Salvage Credits	6,919.08
Net Balance due for Capital Expenditures	$56,824.31

New Haven, Conn.
May 17, 1938.

362

Howard S. Palmer, James Lee Loomis, Henry B. Sawyer, Trustees of the property of THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR, and of OLD COLONY RAILROAD COMPANY, DEBTOR.

EXCERPTS FROM OLD COLONY EXHIBIT #2 DATED MAY 17, 1938 FILED AT HEARING ON TRUSTEES REPORT OF ADMINISTRATION OF OLD COLONY RAILROAD— MAY 24, 1938.

Statement of Revenues and Expenses of Operating the Property of Boston and Providence Railroad Corporation.

363

	Total June 4, 1936 to December 31, 1937
Operating Revenues:	
Freight	$ 5,433,804.05
Passenger	4,141,004.18
Other	1,841,468.50
Total Operating Revenues	$11,416,276.73
Operating Expenses:	
Maintenance of Way and Structures	1,304,892.59

364	Miscellaneous Operations	271,255.33
	General	493,471.2[illegible]
	Transportation for Investment—Cr.	* 355.22
	Total Operating Expenses	$10,301,122.79
	Net Revenue from Railway Operations	$ 1,115,153.94
	Railway Tax Accruals	$ 1,390,252.31
	Hire of Freight Cars—Dr. Balance	372,281.23
	Other Equipment Rents—Net Dr.	43,741.80
	Joint Facility Rents—Net Dr.	670,578.17
365	Net Railway Operating Income #	1,361,699.57

* Credit
\# Deficit

	Non-Operating Income	$ 232,207.54
	Gross Income #	1,129,492.03
	Deductions from Gross Income	226,073.37
	Net Income #	$ 1,355,565.40
366	Intra System Items:	
	Handling Company Coal	$ 129,635.97
	Interest on Investment in Equipment	281,613.57
	Interest on Investment in Facilities	1,209,409.68
	Total Intra System Items	$ 1,620,659.22
	TOTAL DEFICIT INCLUDING INTRA SYSTEM ITEMS	$ 2,976,224.62

\# Deficit

(u) Order on Petition of the Trustees for a Charge Upon the Earnings and Property of Boston and Providence Railroad Corporation for Administration for the Period June 4, 1936 to December 31, 1937. 367

(Order No. 301.)

[SAME TITLE.]

The petition of the Trustees of the property of the Principal Debtor and of Old Colony Railroad Company for a charge upon the earnings and property of Boston and Providence Railroad Corporation for administration for the period June 4, 1936 to December 31, 1937, both dates inclusive, having come on for final hearing which was duly noticed, Bentley W. Warren and Charles W. Mulcahy as the Trustees of the property of Boston and Providence Railroad Corporation having filed their objections thereto dated March 11, 1939, all parties having been heard or given opportunity to be heard, and the Court being duly advised in the premises FINDS: 368

That the facts alleged in said petition are true, and it is 369

ORDERED, ADJUDGED AND DECREED:

(1) That the accounts as stated in said petition be and they hereby are approved in the amount of $3,955,298.93, for the period June 4, 1936 to December 31, 1937 (both dates inclusive); subject, however, to adjustment to be reflected in the accounts for succeeding periods, with respect to items stated in the approved account on an accrual basis and subsequently liquidated.

370 *Petition of The Provident Institution for Savings in the Town of Boston, Creditor, for Reorganization of the Boston and Providence Railroad Corporation.*

(2) That said amount be and it hereby constitutes a lien, charge or claim on the earnings and property of Boston and Providence Railroad Corporation, prior to any mortgage or other lien, charge or claim thereon and prior to any other indebtedness of said Corporation, in favor of the Trustees of the property of the Principal Debtor herein; provided, however, that if and to the extent that said lien and charge shall be satisfied from the estate of Boston and Providence Railroad Corporation, the lien
371 and charge imposed upon the estate of the Old Colony Railroad Company under Order No. 300 herein, shall be correspondingly reduced.

(3) That the question of interest upon the amount of the charge imposed by paragraph (2) hereof be and it hereby is reserved for later determination.

Enter:

C. C. HINCKS,
District Judge.

Dated, April 20, 1939.

372

(v) Petition of The Provident Institution for Savings in the Town of Boston, Creditor, for Reorganization of the Boston and Providence Railroad Corporation.

On August 4, 1938, The Provident Institution for Savings in the Town of Boston, a creditor, petitioned the District Court of the United States for the District of Massachusetts for reorganization of the Boston and Providence

373

Railroad Corporation under Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy. The petition recited inter alia that the Boston & Providence lease to Old Colony had been rejected and that the United States Court for the District of Connecticut had ordered, pending its further order, the operation of the property of the Boston and Providence should be continued by the New Haven Trustees for the account of the Boston and Providence.

374

(w) Answer of Boston and Providence Railroad Corporation to Petition of The Provident Institution for Savings in the Town of Boston, Creditor.

On August 4, 1938 Boston and Providence Railroad Corporation filed its answer to the petition of The Provident Institution for Savings in the Town of Boston, Creditor, admitting the principal allegations contained in said petition.

375

376 **(x) Order Approving Petition of The Provident Institution for Savings in the Town of Boston, Creditor, for Reorganization Herein of Boston and Providence Railroad Corporation.**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF MASSACHUSETTS.

IN PROCEEDINGS FOR THE REORGANIZATION OF A RAILROAD.

No. 62413.

377

In the Matter

of

BOSTON AND PROVIDENCE RAILROAD CORPORATION,

Debtor.

Upon due consideration of the petition of The Provident Institution for Savings in The Town of Boston, verified August 3, 1938, and filed August 4, 1938, alleging among other things that Boston and Providence Railroad Corporation is a railroad corporation organized and existing
378 under the laws of the States of Massachusetts and Rhode Island, and is a common carrier by railroad engaged in the transportation of persons and property in interstate commerce in those states, with its principal executive office in the City of Boston, in the District of Massachusetts; that Boston and Providence Railroad Corporation is confronted with indebtedness in substantial amounts, and is unable to meet its debts as they mature, and that Petitioner as a creditor, having claims aggregating not less than five (5) per centum of all the indebtedness of said Railroad Corporation, as shown in the latest annual report

379

filed with the Interstate Commerce Commission, proposes that said Railroad Corporation shall effect a reorganization herein; and the Boston and Providence Railroad Corporation, having made and filed its answer to such petition, admitting the jurisdiction of this Court and the material allegations of the petition, and the Court being satisfied that said petition complies with Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy as amended, and has been filed in good faith, it is

ORDERED:

1. That said petition be, and it hereby is, approved as properly filed under such Section 77.

380

2. That until further order, all persons, firms and corporations, whatsoever, and wherever situated, located or domiciled, be and they hereby are restrained and enjoined from interfering with, seizing, converting, appropriating, attaching, garnisheeing, levying upon, or enforcing liens upon, or in any manner whatsoever disturbing any portion of the assets, goods, money, deposit balances, credits, choses in action, interests, railroads, properties or premises belonging to, or in the possession of the Debtor, Boston and Providence Railroad Corporation, or from interfering in any manner with the present operation of its railroad or properties or the carrying on of its business until the further order or orders of this Court.

381

3. That the Debtor, Boston and Providence Railroad Corporation, hereby is directed to cause a notice, directed to its creditors and stockholders, to be published within five (5) days from the date of entry of this order once in the Boston Herald and in the Boston Post, newspapers published in the City of Boston, Massachusetts, and once

Exhibit A, Annexed to Order Approving Petition of The Provident Institution, etc.

382 in the Providence Journal, a newspaper published in the City of Providence, Rhode Island, of a hearing to be held on August 22, 1938, at 11 o'clock, A. M., D. S. T., in the Court Room in the Federal Post Office Building, Post Office Square, Boston, Massachusetts, at which hearing, or any adjournment thereof, this Court will appoint one or more trustees of the Debtor's property. The notice of such hearing shall be substantially in the form of the notice annexed hereto, made a part hereof, and marked "Exhibit A". When such publication has been completed, 383 the Debtor shall file with the Clerk of this Court its report with respect thereto.

WITNESS the Honorable Francis J. W. Ford, Judge of the said court, and the seal thereof, at Boston, in said district, on this fifth day of August, 1938.

ARTHUR M. BROWN,
Deputy Clerk.

August 5, 1938.

F. J. W. F.,
D. J.

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384 EXHIBIT A, ANNEXED TO ORDER APPROVING PETITION OF THE PROVIDENT INSTITUTION, ETC.

NOTICE TO ALL CREDITORS AND STOCKHOLDERS

OF

BOSTON AND PROVIDENCE RAILROAD CORPORATION.

Pursuant to an order entered August 5, 1938, by the Honorable Francis J. W. Ford, Judge of the District Court

385

of the United States for the District of Massachusetts, notice is hereby given that a hearing will be held on August 22, 1938, at 11 o'clock, A. M. D. S. T., by said Judge, in the courtroom in the Federal Post Office Building, Post Office Square, Boston, Massachusetts, at which hearing the Court will, pursuant to the provisions of Section 77 of the Act, entitled, "An Act to establish a uniform system of bankruptcy throughout the United States", approved July 1, 1938, and acts amendatory thereof and supplementary thereto, appoint one or more trustees of the property of said Boston and Providence Railroad Corporation.

386

BOSTON AND PROVIDENCE
RAILROAD CORPORATION.

Dated at Boston, Massachusetts,
August , 1938.

(y) Lease, Dated April 7, 1888, from Boston and Providence Railroad Corporation to Old Colony Railroad Company.

387

THIS INDENTURE, made this seventh day of April, in the year of our Lord one thousand eight hundred and eighty-eight, by and between the BOSTON AND PROVIDENCE RAILROAD CORPORATION, party of the first part, hereinafter called the lessor, and the OLD COLONY RAILROAD COMPANY, party of the second part, hereinafter called the lessee, both parties being corporations created by the laws of Massachusetts,

WITNESSETH: That the said parties, each for itself, its

388 ***Lease Dated April 7, 1888 From Boston and Providence Railroad Corp. to Old Colony Railroad Co.***

grants, covenants and agreements herein made by the other, have granted, covenanted and agreed, and do hereby GRANT, COVENANT AND AGREE, each to and with the other, and its successors and assigns, as follows, to wit:—

First. The lessor doth grant, demise and lease unto the lessee, its successors and assigns, all its railroad and property of every description, including therein its railroad, lands and wharves, branches, tracks, side-tracks, road-beds, superstructure, station houses, depot grounds, 389 depots, viaducts, bridges, piers, shops, buildings and fixtures, whether within its location or not, and also its engines, cars, rolling stock, machinery, tools, furniture, appliances, telegraph apparatus, equipment, and all rights, franchises, easements, privileges and appurtenances thereunto belonging, together with the right to demand and receive all tolls, rents, revenue, income and profits of the demised premises, including also therein all the right, title and interest of the lessor in and to any and all railroads operated by it, under lease or otherwise, and in or to any stock of other corporations owned by it, or held for it, all dividends thereon, and the right of voting on the same, and in and to all contracts and obligations of or with other 390 railroads, corporations or individuals, and all income advantages and benefits to be derived therefrom, hereby assigning and transferring unto the lessee, under the terms and provisions of this lease, and for the purposes thereof, all its railroad, railroad property, franchises and assets of every description, however described and wherever situated, excepting only its papers and books of account, and material and supplies, bills and accounts receivable, money and cash on hand, which papers and books of account shall be at all times open to the reasonable inspection of the

391

lessee, so far as required for its protection under this lease.

To HAVE AND TO HOLD all and singular the demised premises to the lessee, its successors and assigns, for and during the term of ninety-nine years from and after the first day of April, in the year of our Lord one thousand eight hundred and eighty-eight: the lessee paying unto the lessor the rent hereby reserved, and keeping and performing the terms, conditions and agreements hereinafter contained to be by it kept and performed.

392

Second: The lessor will at all times, upon reasonable request, execute and deliver any and all instruments, and take any other action, at the request and expense of the lessee, that may be requisite or necessary to confirm, carry out, effectuate and establish the terms of this lease and agreement to its full meaning and intent, and to vest in and secure to the lessee the full use and enjoyment of the railroads and property demised or intended to be demised hereby. The lessor will during the continuance of this lease and agreement maintain its existence and organization as a corporation, and to that end will comply with all the requisites and forms of law, and it will, at the request and expense of the lessee, do and perform all such acts, lawful and consistent with its rights hereunder, as shall be proper and necessary for the due protection, preservation and full enjoyment by the lessee of all the property, rights, franchises and interests hereby demised or granted to it, and to carry out the true intent and meaning of this instrument; and in default thereof it hereby authorizes the same to be done by the lessee, or by its agents, successors and assigns, in the name and as the act of the lessor; and the lessee, its successors and assigns

393

394 may, at its or their own expense and charge, and for its or their own use and benefit, use the name, franchise and corporate power of the lessor in commencing, prosecuting or defending any suit or proceeding, or taking any action which may be necessary or proper to enable it or them to defend, assert, exercise or maintain any right or privilege secured to it or them by this instrument, or arising from the title or possession thereunder, or to enforce payment of damages for injuries thereto, and to give due receipts, acquittances and discharges on account
395 thereof and in relation thereto.

Third: The lessee shall not assign this lease, nor underlet the whole or any part of the demised premises, except such portions thereof as may not be required by it for railroad uses, without the consent of the directors of the lessor. But if the lessee shall unite with, or sell, or lease its railroad to any other railroad corporation, it may assign this lease to the corporation formed by such union, or to the corporation to which it thus sells or leases, such corporation becoming, and the lessee remaining, liable upon the covenants thereof.

396 Fourth: The lessee shall observe and perform all the provisions of contracts of the lessor with the owners of railroads now leased or operated by it, and shall pay the rent and perform the covenants, in the lease of the Attleboro Branch Railroad to the lessor, dated the thirty-first day of December, A. D. 1870; and at the termination of said lease, the same shall, if requested by the lessee, and if it can be done, be renewed by the lessor, from time to time, upon the most favorable terms practicable, for a term or terms not exceeding the then unexpired term of this lease; and being so renewed, shall be subject to all

397

the provisions of this lease and agreement, as effectually as if now existing and herein included, and upon the expiration, or earlier termination of this lease, shall be reassigned to, and inure to the benefit of, the lessor.

Fifth: The lessee shall pay to the lessor, as rent for the demised premises, the sum of one hundred thousand dollars for each quarter in each year during the term of this lease, to wit: On the first day of July, the first day of October, the first day of January, and the first day of April, in each and every year (the first payment to be made on the first day of July, A. D. 1888), and at the same rate for any portion of a quarter, at the office of the treasurer of the lessee, in the city of Boston; and shall also pay to the lessor, during the first three (3) years of said term, the sum of ten thousand dollars ($10,000) per annum, in equal quarterly payments, on the same days as said rent is payable; and each and every year thereafter, during said term, the sum of three thousand dollars ($3,000), in like manner, as and for the expense of preserving the organization of the lessor, as herein agreed to be preserved and kept up. And the lessee will, on the first day of May, 1888, pay to the lessor the sum of thirteen hundred thousand dollars ($1,300,000), and also a sum equal to five dollars ($5) per share upon its capital stock, as and for a dividend, out of the net earnings of the lessor up to the date of this lease. The lessee shall also pay, as the same becomes due, the interest on the indebtedness of the lessor (a schedule whereof is hereto annexed), and upon such future indebtedness as shall be created for the purpose of paying such indebtedness and other existing obligations and liabilities of the lessor, in the manner herein provided, and to that end shall pay to the lessor such sums of money at such times as shall

398

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400 enable it punctually to meet such interest as the same comes due. And the lessee shall also pay all taxes a assessments, whether in the nature of taxes, now in be or not, of every description, national, state and municip or otherwise, upon the property, business, franchises a capital stock of the lessor as the same shall be imposed assessed, and shall at all times keep the lessor indemnif against the same during the term of this lease.

Sixth: The lessee shall at its own expense maint
401 and keep the railroad and property herein demised, a the railroad and property of the Boston & Provide Railroad Corporation in Rhode Island, hereinafter cal the "Rhode Island Company," in as good order and c dition as the same now are, and use and operate them accordance with the charter of the lessor, and the laws the Commonwealth of Massachusetts, and of the St of Rhode Island, and of the United States, so far as same are respectively applicable, shall make all retu required of it by law, and furnish the lessor with su statements and accounts as shall enable it to make returns by law required of it, and shall furnish all ca engines, rolling stock and equipment required, in
402 dition to the like property hereby demised for the and proper use and operation thereof, in such man as at all times to meet the demands of the public servi and to furnish equal facilities for travel and busin with those now afforded by the lessor, and it shall ap the proceeds of rolling stock and other personal prope herein demised, which it may deem advisable to sell, a which (with the exception of stocks of other corporatio it is hereby authorized to sell at its discretion, so as substitute therefor other like property for use in

403

maintenance and operation of said railroad and property of equal value.

Seventh. The lessee shall furnish the officers of the lessor with proper accommodations at the station of the demised railroad in Boston, and with free transportation for themselves and an inspector over the railroad hereby demised (it being understood that such officers shall not exceed a president, treasurer, clerk, and six directors); and shall permit some suitable person, appointed by the directors of the lessor as an inspector of the demised property, to examine the same once in each year, so far as may be necessary to ascertain the condition thereof, and shall pay the reasonable expense of such annual inspection, in addition to the rent herein reserved.

404

Eighth. The lessee will, during the continuance of this lease, protect and save harmless the lessor and the Rhode Island Company against all actions or claims for injury to persons or property during the term thereof, by reason of any want of repair of the demised road and property or appurtenances, or of the road, property and appurtenances of the Rhode Island Company, or any want of care and skill in the operation and management of the same, or by reason of any defects therein; and will not permit the lessor or the Rhode Island Company to be subjected to any payment, penalty or forfeiture, for violation of law in any respect in relation to the maintenance and operation of their said roads and property; but will indemnify and save them harmless against all loss, cost, damage or liability caused by it, or arising out of the use and operation of said roads and property, whether by reason of any contract, statute, negligence, or misfeasance, or by reason of the neglect of the lessee or lessor to use

405

406 and operate said railroad and property as required by la during the continuance of this lease. The lessee will ma all permanent improvements on said railroads and pro erty at its own expense; will keep the demised premis reasonably insured, and apply the proceeds of any insu ance to restoring and replacing the property destroye or otherwise to the benefit of the demised property; a at the expiration or earlier termination of this lease, will return said demised road, and property to the less as a railroad between Boston and Providence, with its n

407 existing branches and suitably equipped and provided wi depots, stations, shops, and other structures, of at lea equal value with those now existing thereon, and in good order and condition as the same now are, togeth with all permanent improvements thereon; and with ro ing stock, machinery, tools, furniture, appliances, telegra apparatus, and equipment, of equal value with that here demised according to the appraisal thereof.

Ninth. The lessor will, upon the written request the lessee, from time to time, convey to such person persons as the lessee may appoint in such request, su portions and parcels of the real estate owned by the less

408 outside of its location, and not required by the lessee f railroad purposes, as the lessee may designate, and up such reasonable terms and for such reasonable price it may direct, at its expense, the proceeds to be receiv by the lessee, but upon an express agreement, however, the lessee, that all proceeds thereof, or a sum equal the to, shall be, or shall previously have been, from the fun of the lessee, applied to additions other than impro ments upon railroads of the lessor or their branch or connected with their real estate, which shall thereup become the property of the lessor, and subject to the p

visions of this instrument; and if at the expiration or earlier termination of this lease the lessee shall not have expended in such additions a sum equal to the proceeds of the real estate so conveyed, the balance unexpended shall be paid over to the lessor without interest. But the lessor shall not be obliged, unless its directors consent, to convey any of its real estate in Boston east of the present Dartmouth Street bridge, or of the tract of land owned by it near the junction of its main road with the Dedham branch thereof, and between said branch and the New York and New England Railroad, containing about thirty-three (33) acres, upon which tract, unless thus previously conveyed, and unless it shall return the shops of the lessor now existing, the lessee shall, if not otherwise agreed with the directors of the lessor, place the shops which it is to return to the lessor upon the expiration or earlier termination of this lease, under the Eighth Article hereof.

409

410

Tenth. The capital stock of the Boston & Providence Railroad Corporation in Rhode Island (herein called the Rhode Island Company) owned by the lessor, embraced within the terms of this lease, and assigned to the lessee at the time of the delivery hereof, shall be held and used by the lessee during the term of this lease, for the purpose of maintaining the road and property of said Rhode Island Company, as a practical extension and portion of the road and property of the lessor, and at the termination of this lease shall be reassigned to the lessor in such manner as to return to it the entire ownership of the present road and property of said Rhode Island Company, and all improvements thereon. But if the Rhode Island Company or the lessee shall, for the purpose of improving terminal facilities at Providence, or other necessary railroad purposes in Rhode Island, exchange land for other

411

412

land therein of equal value, or sell land and purch
other land of equal value for the same purpose, the l
thus obtained by exchange or purchase shall be recei
by the lessor at the expiration or earlier termination
this lease, in place of such land so exchanged or sold.

Eleventh. The lessor hereby assigns, transfers and
livers to the lessee all its material and supplies, bills
accounts receivable, money and cash on hand to be by
lessee applied (at the value thereof to be fixed by
413 praisal), to the payment of the dividend herein agr
to be paid upon the capital stock of the lessor on the f
day of May, 1888, and to the payment of outstanding
bilities of the lessor. The lessor shall issue bonds
periods not exceeding the longest allowed by law, and
a rate of interest as low as practicable, for such sums
may be necessary to fund all its outstanding liabili
which are not thus paid, including the expense of
fending and adjusting all claims and suits against
lessor, arising in the past use and operation of the
mised premises, or of any railroad operated by the les
which bonds shall, at the request of the lessee, be
tended as they mature for periods not exceeding the
414 expired term of this lease on the most favorable terms t
practicable.

To provide for the payment of the net indebtedness
the lessor as thus ascertained and funded, the lessee sh
within six months after the same is thus approximat
ascertained, and not later than January 1st, 1890, est
lish a sinking fund in the hands of three trustees,
pointed and maintained by its directors from their o
number, and shall make such annual or more frequ
payments thereto as may be necessary, with interest
four per cent. per annum, compounded semi-annually,

415

cause it to meet said indebtedness during the term of this lease. And the lessee hereby agrees that such sinking fund shall be adequate to pay, and shall pay, said indebtedness at its maturity, as thus funded and extended, and that it will make up any deficiency therein. All bonds thus issued shall be certified by the lessor and lessee as issued under the provisions of this lease.

Twelfth. The lessee shall not sell or otherwise dispose of any of the stocks herein demised and transferred to it, except by assignment of this lease in case of its union 416
with, or sale, or lease of its railroad to some other railroad corporation, as provided in Article Third hereof, in which case it may assign them to the corporation formed by such union, or to which it thus sells or leases, to be held by such corporation in the same manner and under the same restrictions as the same are herein provided to be held by the lessee. But the lessee, with the consent of the Board of Directors of the lessor, may, at any time, sell and transfer all or any portion of the stocks of other corporations embraced within the terms of this instrument and hereby demised, except the stock of the Rhode Island Company, and in case of such sale, unless the lessee shall have otherwise disposed of the proceeds thereof, by the 417
consent of the directors of the lessor, it shall pay over to the lessor, at the expiration or earlier termination of this lease, the price received, without interest, in full of all obligation upon its part to return such stocks to the lessor under the provisions of this instrument. Provided, however, that the stocks of the Union Freight Railroad and of the Providence, Warren and Bristol Railroad, if not thus sold, shall be returned to the lessor, in such manner as to give it the same proportionate interest in and control over the present roads and property of such corpora-

418 tions with all permanent improvements thereon, as the lessor now has thereby.

Thirteenth. If this lease shall be terminated within the demised term of ninety-nine years without fault of the lessee, the lessor shall pay the lessee a proportional part (having regard to the unexpired portion of the lease and other circumstances) of its indebtedness which may have been funded by the lessor and paid by the lessee under the provisions of this instrument, [but not including
419 interest which may have been paid thereon], and of the cost of such permanent improvements as may have been made and paid for by the lessee upon the demised premises and if the parties are unable to agree with reference thereto, the same shall be submitted to the decision of three arbitrators, one chosen by each party, and the other by the two thus chosen, whose decision shall be final; and if at any time it shall happen that this lease shall be or become invalid, or shall be terminated without the fault of either party, then, and in such case, each party shall be restored, as nearly as may be, to the condition in which it stood before the lease, it being understood that the rent and interest paid by the lessee on the funded debt of the
420 lessor shall be considered equivalent to the value of the occupation, but that the lessor is not to repay any part of the money agreed to be paid to it by the lessee on the first day of May, 1888, under the provisions of Article Five hereof.

Fourteenth. This lease and agreement are upon the condition that if the lessee shall neglect and refuse to pay the rental herein, reserved, or any part thereof, or to pay the interest upon the indebtedness of the lessor, as herein agreed to be paid, for more than thirty days after the

421

same shall become due and payable; or if the lessee shall continue to neglect or fail to perform any or either of the other covenants, on its part to be performed, for more than six months after written notice from the lessor of such neglect or failure, and that, if continued, it will be regarded as a forfeiture of this lease, then, and in either of such cases, the lessor may lawfully, at any time after the lapse of said thirty days or six months, as the case may be, and while such neglect or default continues, without further notice or demand, enter into or upon the leased premises, or any part thereof, in the name of the whole, 422
and repossess the same as of its former estate, and expel the lessee, and those claiming under it, without prejudice to any remedies which might otherwise be used for arrears of rent, or preceding breach of covenants; but nothing herein shall be considered to work a forfeiture of this lease when the omission or delay in performing the obligations hereunder—saving only the payment of rent and of interest—results from causes reasonably beyond the control of the lessee, or when from any cause such omission or delay ought not in equity to work a forfeiture; and in case of disagreement as to the duty of the lessee in performing any of its covenants,—except those for the payment of rent and of interest,—the failure to perform the same shall not 423
entitle the lessor to enter for breach of covenant until the lapse of sixty days after the final determination of the question by suit or arbitration.

Fifteenth. That the property herein demised and to be accounted for at the expiration or earlier termination of this lease may be accurately determined, there shall be made, as of the day when this lease takes effect, a full, complete and particular inventory, and description of all

424 estate and property, real and personal, belonging to the lessor, and coming into the possession of the lessee by virtue of this lease, and that the value of the engines, cars, rolling stock, machinery, tools, furniture, appliances, telegraph apparatus and equipment hereby demised, and to be returned may be fixed, an appraisal thereof shall be made. Such inventory, description and appraisal shall be made by two competent persons, one selected by each party. In case of their disagreement, they shall refer the matter in difference to some third person, whose decision shall 425 be final. Such inventory, description and appraisal shall be made in duplicate, and an original furnished to each party, and shall be evidence of the nature, value and condition of the property at the time it is made in all cases in which any question of such nature, condition or value may arise.

Sixteenth. In case of any question or controversy arising between the parties hereto as to the meaning and intent of this instrument, or any part thereof, or as to anything done thereunder, or growing out thereof, the same shall be referred to the arbitration of two referees, one selected by each party, who shall have power, in case of 426 their disagreement, to choose a third, and the award of the referees so selected, or of a majority of them, shall be final and binding upon the parties.

In Witness Whereof, the Boston and Providence Railroad Corporation, by its President, Henry A. Whitney and its Treasurer, Benjamin B. Torrey, and the Old Colony Railroad Company, by its President, Charles F. Choate, and its Treasurer, John M. Washburn, have to this and one other instrument of even date and tenor herewith, signed

427

their corporate names and affixed their corporate seals, the day and year first above written.

THE BOSTON AND PROVIDENCE RAILROAD CORPORATION.

By HENRY A. WHITNEY, President.
BENJAMIN B. TORREY, Treasurer.

OLD COLONY RAILROAD COMPANY.

By CHARLES F. CHOATE, President.
JOHN M. WASHBURN, Treasurer.

428

(Seal of Old Colony Railroad Company)

(Seal of Boston and Providence Railroad Corporation)

(Duly acknowledged on April 11, 1888.)

429

430 **(z) Report of Administration of the Properties o Old Colony Railroad Company, of Boston an Providence Railroad Corporation, and of Prov dence, Warren and Bristol Railroad Compan for 1938.**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF CONNECTICUT.

In Proceedings for the Reorganization of a Railroad.

No. 16562

431

In the Matter

of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILRO COMPANY,

Debt

Now come Howard S. Palmer, James Lee Loomis a Henry B. Sawyer, as the Trustees of the property of t Principal Debtor (hereinafter called "the New Hav
432 Trustees"), and respectfully represent:

1. On April 19, 1938 the New Haven Trustees fi herein their report of administration which stated accounts of their administration of the properties of Colony Railroad Company (hereinafter called "the Colony") and of Providence, Warren and Bristol R road Company from October 23, 1935 up to and includ December 31, 1937; and on July 18, 1938, this Co entered its Order No. 300 herein which approved s

accounts in the amount of $11,789,037.22 and further provided:

"2. That $11,237,101.22 of said amount be and it hereby constitutes a lien, charge or claim on the earnings and property of Old Colony Railroad Company as an expense of administration prior to any mortgage or other lien thereon and to any other indebtedness of said Company, and may be recovered by the Trustees of the property of the Principal Debtor herein out of the earnings or property 434
of said Old Colony Railroad Company by such method as the Court shall hereafter determine.

"3. That the incidence of the $551,936.22 for administration of the property of Providence, Warren and Bristol Railroad Company be and it hereby is reserved for later determination.

"4. That the question of interest upon said amounts be and it hereby is reserved for later determination."

The New Haven Trustees beg leave to refer to said report of administration and to said Order No. 300 with the same force and effect as if they were set forth fully herein. 435

2. By Order No. 217, entered herein on July 19, 1938, the Court ordered the Old Colony Trustees forthwith to reject the lease dated April 7, 1888 from Boston and Providence Railroad Corporation (hereinafter called "the Boston and Providence") to the Old Colony, and said lease was so rejected on the same day.

436

3. Paragraph 5 of said Order No. 217 provided as follows:

> "Pending further order of Court the operation of the property of Boston and Providence for the account of that corporation shall be continued pursuant to subdivision (c) (6) of Sec. 77 of the Bankruptcy Act, and since the Old Colony Railroad Company, as lessee of Boston and Providence and likewise the Old Colony Trustees, are wholly without any operating organization, the operation of
437 Boston and Providence properties shall be conducted by the New Haven Trustees in behalf and for the account of the Old Colony estate but without expense to the New Haven estate."

4. In paragraph 8 of Petition for Order No. 301, filed herein on July 29, 1938, it was alleged that said amount of $11,237,101.22 included $3,955,298.93 covering payments made under the aforesaid lease from the Boston and Providence and expenditures incurred in administration of property of the Boston and Providence during the period June 4, 1936 to December 31, 1937 (both dates inclusive) and on April 20, 1939 this Court entered its Order No.
438 301 herein which provided:

> "(1) That the accounts as stated in said petition be and they hereby are approved in the amount of $3,955,298.93, for the period June 4, 1936 to December 31, 1937 (both dates inclusive); subject, however, to adjustment to be reflected in the accounts for succeeding periods with respect to items stated in the approved account on an accrual basis and subsequently liquidated.

439

"(2) That said amount be and it hereby constitutes a lien, charge or claim on the earnings and property of Boston and Providence Railroad Corporation, prior to any mortgage or other lien, charge or claim thereon and prior to any other indebtedness of said Corporation, in favor of the Trustees of the property of the Principal Debtor herein; provided, however, that if and to the extent that said lien and charge shall be satisfied from the estate of Boston and Providence Railroad Corporation, the lien and charge imposed upon the estate 440
of the Old Colony Railroad Company under Order No. 300 herein, shall be correspondingly reduced.

"(3) That the question of interest upon the amount of the charge imposed by paragraph (2) hereof be and it hereby is reserved for later determination."

5. The New Haven Trustees have continued to operate the properties of the aforesaid subsidiary debtors and of the Boston and Providence for their account, as directed by orders of this Court, and have made certain capital expenditures upon said properties and certain tax 441
payments as authorized by this Court.

6. The New Haven Trustees have prepared accounts of their administration of the properties of said subsidiary debtors and of the Boston and Providence for the year 1938, which said accounts are hereto annexed, made a part hereof, and marked Exhibit 1, said Exhibit consisting of a Summary of Accounts covering Administration of the Property of Old Colony Railroad Company, Boston and Providence Railroad Corporation and Providence, Warren and Bristol Railroad Company, for the Year 1938

442 (with statements marked A and B attached). Said Exhibit has been prepared from records and accounts prepared and kept by the New Haven Trustees pursuant to orders herein.

7. The charges stated in said accounts for expenditures for additions and betterments and the net credits for property retired and not replaced are drawn from the current accounts of the New Haven Trustees. The revenues and expenses of operation of the properties have
443 been credited or charged, as the case may be, on the basis of the segregation formula duly approved herein, subject to the following adjustments:

(a) By reason of Order No. 221 herein, the Old Colony has been debited $21,073.01 and the Boston and Providence has been credited $22,135.10 in the segregation results for the year 1938.

(b) By reason of an adjustment in taxes of the Boston Terminal Company, the Old Colony has been credited with $27,048.02 in Joint Facility Rents for the administration period prior to June 1, 1936, and the Boston and Providence has been charged
444 $177.32, the 1938 segregation having allowed the Old Colony adjustment only back to June 1, 1936 and having allowed the Boston and Providence adjustment back to that date instead of to June 3, 1936.

(c) $7,500.00 has been credited to the Old Colony and $7,500.00 has been credited to the Boston and Providence for the dividend of $15,000.00 from the Union Freight Railroad Company covering the year 1937.

445

(d) The Old Colony has been debited $42,322.23 and the Boston and Providence has been credited $36,417.64, to correct the past allocation of storage and demurrage revenues and certain operating expenses at Pawtucket, Rhode Island, and to correct past allocations in the account for crossing protection at Mansfield, Massachusetts, and in the accounts for train fuel and for handling company coal.

8. There is also annexed hereto, made a part hereof, and marked Exhibit 2, a statement of taxes accrued prior to October 24, 1935, but paid thereafter by the Trustees of the property of The New York, New Haven and Hartford Railroad Company on the property and income of Old Colony Railroad Company, Boston and Providence Railroad Corporation and Providence, Warren & Bristol Railroad Company. 446

WHEREFORE, the New Haven Trustees pray that the Court approve the accounts herein reported in the aggregate amount of $5,750,920.01, subject to adjustment to be reflected in the accounts for subsequent periods with respect to items stated on an accrual basis and subsequently liquidated, and order as follows: 447

(a) That $5,562,505.51 of said amount with such interest thereon as is later determined to be payable constitute a lien and charge on the earnings and property of Old Colony Railroad Company as an expense of administration prior to any mortgage or other lien thereon and to any other indebtedness of said Company and on a parity with like charges held to have such priority under Order No. 300 and like orders entered or to be entered herein;

(b) That $2,182,728.63 of said amount with such inter-

448

est thereon as is later determined to be payable, covering administration of the property of the Boston and Providence Railroad Corporation in the possession of this Court during the year 1938, constitute a lien and charge on the earnings and property of Boston and Providence Railroad Corporation prior to any mortgage or other lien, charge or claim thereon and prior to any other indebtedness of said Corporation and on a parity with like charges held to have such priority under Order No. 301 and like orders entered or to be entered in favor of the Trustees of the

449 property of the Principal Debtor as an expense of administration of said property of said Corporation by said Trustees, and that, if and to the extent that said lien and charge shall be satisfied from the estate of Boston and Providence Railroad Corporation, the lien and charge imposed upon the estate of Old Colony Railroad Company hereunder shall be correspondingly reduced;

(c) That $188,414.50 of said amount with such interest thereon as is later determined to be payable constitute a lien or charge on the earnings and property of Providence Warren and Bristol Railroad Company prior to any mortgage or to any other indebtedness of said Company and

450 on a parity with like charges held to have such priority under Order No. 341 and like orders entered or to be entered herein.

Dated: August 1, 1939.

H. S. PALMER
JAMES LEE LOOMIS
HENRY B. SAWYER
Trustees

W. W. MEYER
Counsel for Trustees.

(Verification omitted in printing.)

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EXHIBIT 1, ANNEXED TO REPORT OF ADMINISTRATION OF THE PROPERTIES OF OLD COLONY RAILROAD CO., ETC.

HOWARD S. PALMER, JAMES LEE LOOMIS, HENRY B. SAWYER, TRUSTEES.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR.

SUMMARY OF ACCOUNTS COVERING ADMINISTRATION OF THE PROPERTY OF OLD COLONY RAILROAD COMPANY, BOSTON AND PROVIDENCE RAILROAD CORPORATION AND PROVIDENCE, WARREN AND BRISTOL RAILROAD COMPANY, FOR THE YEAR 1938

	Old Colony Railroad Year 1938	Boston and Providence Railroad Jan. 1st. to July 19, 1938	Boston and Providence Railroad July 20th. to Dec. 31, 1938	Year 1938	Prov., Warren and Bristol Railroad Year 1938	Grand Total
Capital Expenditures (Net) (Statement A)	#$ 40,753.09	$ 5,559.23	$ 4,894.94	$ 10,454.17	$ 2,113.17	#$ 28,185.75
Operating Deficits (Statement B)	2,301,868.35	704,400.33	430,993.80	1,435,394.13	147,621.78	3,584,884.26
Charges for handling Company Coal and Interest on Investment in Equipment and Other Facilities not included in above Operating Deficits (Statement B)	165,424.27	569,154.20	467,726.13	1,036,880.33	25,457.47	1,227,762.07
Grand Total	$2,426,539.53	$1,279,113.76	$903,614.87	$2,182,728.63	$175,192.42	$4,784,460.58

Credit.

New Haven, Conn.,
May 4, 1939.

(Statements A and B omitted in printing.)

EXHIBIT 2, ANNEXED TO REPORT OF ADMINISTRATION OF THE PROPERTIES OF OLD COLONY RAILROAD CO., ETC.

HOWARD S. PALMER, JAMES LEE LOOMIS, HENRY B. SAWYER, TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR

STATEMENT OF TAXES ACCRUED PRIOR TO OCTOBER 24, 1935 BUT PAID THEREAFTER BY TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY ON THE PROPERTY AND INCOME OF OLD COLONY RAILROAD COMPANY, BOSTON AND PROVIDENCE RAILROAD CORPORATION AND PROVIDENCE, WARREN AND BRISTOL RAILROAD COMPANY

OLD COLONY RAILROAD COMPANY

Detail		Voucher No.	Period Covered	Date Paid	Massachusetts Gross Amount	Rhode Island Gross Amount
Abington,	Mass.	40762	Calendar Year 1935	12/30/35	$ 1,076.93	
Attleboro,	"	40765	"	12/28/35	493.30	
Barnstable,	"	40768	"	12/23/35	2,317.27	
Braintree,	"	40775	"	12/30/35	19,418.40	
Brockton,	"	40766	"	1/ 3/36	38,480.02	
Bourne,	"	40778	"	12/26/35	1,437.96	
Canton,	"	40779	"	12/24/35	80.73	
Clinton,	"	40782	"	1/ 2/36	1,670.06	
Dedham,	"	40786	"	12/28/35	13,637.40	
Fall River,	"	10797	"	12/24/35	49,356.00	
Fitchburg,	"	10799	"	12/30/35	13,395.52	
Framingham,	"	40801	"	12/24/35	7,585.65	
Hanover,	"	40806	"	12/31/35	1,241.35	
Holbrook,	"	40810	"	12/30/35	1,499.46	
Leominster,	"	40815	"	12/24/35	2,878.95	
Lowell,	"	40816	"	12/24/35	9,620.17	
Mansfield,	"	40817	"	12/26/35	1,333.60	
Marlboro,	"	40819	"	12/30/35	3,449.90	
Middleboro,	"	40824	"	12/26/35	2,034.53	
New Bedford,	"	40830	"	12/28/35	38,868.76	
North Attleboro,	"	40833	"	12/30/35	1,094.52	
Plymouth,	"	40840	"	12/24/35	3,052.80	
Provincetown,	"	40841	"	12/27/35	1,464.00	
Randolph,	"	40842	"	12/28/35	1,086.75	
Scituate,	"	40847	"	12/31/35	1,966.94	
Sharon,	"	40850	"	12/28/35	48.90	
Stoughton,	"	40856	"	12/24/35	697.50	
Taunton,	"	40859	"	12/23/35	12,490.85	
Walpole,	"	40862	"	12/26/35	1,065.84	
Wrentham,	"	40872	"	1/11/36	1,355.62	
Norwood,	"	40878	"	12/24/35	1,140.02	
Quincy,	"	40879	"	12/28/35	31,179.30	
Boston,	"	45066	"	2/14/36	229,189.10	
Warren,	R. I.	45252	"	1/15/36	.....	$ 2,004.00
Tiverton,	"	45301	"	1/15/36	.....	2,750.00
Providence,	"	16448	"	1/29/36	.....	16,899.12

Exhibit 2, Annexed to Report of Administration of the Properties of Old Colony Railroad Co., Etc.

HOWARD S. PALMER, JAMES LEE LOOMIS, HENRY B. SAWYER, TRUSTEES OF THE PROPERTY OF
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR

STATEMENT OF TAXES ACCRUED PRIOR TO OCTOBER 24, 1935 BUT PAID THEREAFTER BY TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY ON THE PROPERTY AND INCOME OF OLD COLONY RAILROAD COMPANY, BOSTON AND PROVIDENCE RAILROAD CORPORATION AND PROVIDENCE, WARREN AND BRISTOL RAILROAD COMPANY

BOSTON AND PROVIDENCE RAILROAD CORPORATION

Detail		Voucher No.	Period Covered	Date Paid	Massachusetts Gross Amount	Rhode Island Gross Amount	
Attleboro,	Mass.	40765	Calendar Year 1935	12/28/35	$ 10,105.69		
Canton,	"	40779	"	12/21/35	1,224.20		
Dedham,	"	40786	"	12/28/35	3,911.70		
Mansfield,	"	40817	"	12/26/35	796.00		
Sharon,	"	40850	"	12/28/35	639.29		
Stoughton,	"	40856	"	12/21/35	666.50		
Boston,	"	45066	"	2/11/36	95,816.20		
Central Falls,	R. I.	46447	"	1/17/36	.....	$ 6,023.25	
Providence,	"	46448	"	1/29/36	.....	42,297.54	
"	"	46263	"	11/9/35	.....	5,352.52	
East Providence	"	6174	"	1/15/36	.....	6,089.87	
Total Payments					113,159.58	59,763.18	$172,922.76
Less Recollectible					2,387.37	3,423.93	5,811.30
Net Payments					110,772.21	56,339.25	167,111.46
Proportion accrued prior to October 24, 1935 and not included in previous report of Administration					$ 89,836.26	$ 45,691.13	$135,527.39

PROVIDENCE, WARREN AND BRISTOL RAILROAD COMPANY SUMMARY

Warren,	R. I.	45252	Calendar Year 1935	1/15/36	.....	$ 6,475.20
Providence,	"	46448	"	1/29/36	.....	835.94
Barrington,	"	6172	"	1/17/36	.....	3,246.00
East Providence,	"	6174	"	1/15/36	.....	5,781.13
Total Payments					.....	16,332.27
Less Recollectible					.....	28.84
Net Payments					.....	16,303.43
Proportion accrued prior to October 24, 1935 and not included in previous report of Administration						$13,222.08 $13,222.08

SUMMARY

Old Colony Railroad Company (Real Estate Tax)	$394,891.65
" " " " (Income Tax and Interest)	422,818.31
Total Old Colony	817,709.96
Boston and Providence Railroad Corporation	135,527.39
Providence Warren and Bristol Railroad Company	13,222.08
Total Old Colony System	$966,459.43

New Haven, Connecticut,
May 4, 1939.

Norwood,	"	40618	"				
Quincy,	"	40879	"				
Boston,	"	45066	"	12 28 35	31,179.30		
Warren,	R. I.	45252	"	2/14/36	229,189.10		
Tiverton,	"	45301	"	1 15 36	.....	$ 2,094.00	
Providence,	"	46448	"	1/15/36	.....	2,750.00	
"	"	46263	"	1 29 36	.....	16,899.12	
North Tiverton,	"	50101	"	11/ 9/35	.....	397.88	
" "	"	141	"	11 27/35	.....	441.97	
Middletown,	"	782	"	11 27/35	.....	103.03	
"	"	50663	"	12/18/35	.....	69.15	
				12 18 35	.....	296.65	
Total Payments					495,702.10	22,961.80	$518,663.90
Less recollectible					24,908.29	6,836.18	31,744.47
Net Payments					470,793.84	16,125.62	486,919.43
Proportion accrued prior to Oct. 24, 1935 and not included in previous report of Administration					381,813.77	13,077.88	394,891.65

					Amount	
Income Tax	55003	Calendar Year	1934	12/16/35	44,331.92	
"	20036	"	1935	3/10/36	61,628.91	
"	35024	"	1935	6 9/36	61,628.90	
"	50060	"	1935	9/11/36	61,628.91	
	60857	"	1935	12 10 36	61,628.90	
Income Tax and Interest	62275	Calendar Year	1922			
		1925 incl. & Yr.	1930	2/27/36	131,970.77	
Proportion accrued prior to October 24, 1935 and not included in previous report of Administration						422,818.31
Grand Total due from Old Colony						$817,709.96

460 **(aa) Chapter 516 of the Acts and Resolves passed by the General Court of Massachusetts in the year 1896.**

Chapter 516 of the Acts and Resolves of the General Court of Massachusetts for the year 1896 reads in part and in addition to those parts quoted in the Petition for Order No. 398 hereinbefore set forth, as follows:

"Section 25. The terminal company shall pay a franchise tax to the Commonwealth upon the true market value of its capital stock, without any deduction whatever, but its real estate required by this
461 act to be used by said railroad companies shall be assessed to and the taxes thereon shall be paid by said railroad companies, and in the assessment of franchise taxes upon said railroad companies each of them shall be deemed to be the owner of said real estate in the proportion in which it then has the use thereof under this act."

(bb) Chapter 784 of the Acts and Resolves passed by the General Court of Massachusetts in the year 1913.

462

Chapter 784 of the Acts and Resolves passed by the General Court of Massachusetts in the year 1913 reads in part as follows:

"Section 1. The board of railroad commissioners * * * shall hereafter be called the public service commission * * *"

(cc) Chapter 350 of the General Acts passed by the General Court of Massachusetts in the year 1919.

463

Chapter 350 of the General Acts passed by the General Court of Massachusetts in the year 1919 reads in part as follows:

> "Section 117. The public service commission, existing under authority of chapter seven hundred and eighty-four of the acts of nineteen hundred and thirteen, and chapter two hundred and eighty-three of the General Acts of nineteen hundred and eighteen, and the board of gas and electric light commissioners, existing under authority of chapter seven hundred and forty-two of the acts of nineteen hundred and fourteen, are hereby abolished. All the rights, powers, duties and obligations of said commission and said board are hereby transferred to and shall hereafter be exercised and performed by the department of public utilities established by this act, which shall be the lawful successor of said commission and said board."

464

(dd) Order of the Department of Public Utilities of the Commonwealth of Massachusetts.

465

On July 17, 1931 the Department of Public Utilities of the Commonwealth of Massachusetts entered the following order regarding the proportion of use of The Boston Terminal Company properties, which order has not been amended or withdrawn:

> "After public hearing, the Department determines that the proportion of use of the South Union Station and facilities be fixed at 70% of use by the New York, New Haven and Hartford Railroad Co. and 30% of use by the New York Central Railroad Co., lessee of the Boston & Albany Railroad Co. Alan Brooks, Executive Secretary."

466 **(ee) Brief of New Haven Trustees filed in the Supreme Judicial Court of Massachusetts in proceedings concerning the petition of Boston & Providence Railroad Corporation for re-determination of the proportions of use of The Boston Terminal Company properties.**

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

Equity No. 63858
Equity No. 63859

467 Suffolk, ss.:

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees, THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD CO., Debtor, in Reorganization Proceedings,

vs.

FRANCIS M. McKEOWN, ABRAHAM C. WEBBER, RICHARD D. GRANT, JOHN J. CURLEY, and JOHN M. WHOULEY, constituting the DEPARTMENT OF PUBLIC UTILITIES of the COMMONWEALTH OF MASSACHUSETTS.

468 ---

These two bills have been brought for the purpose of having this Court prevent the respondents from entering upon certain proceedings which the respondents have determined to hold.

Attached to each bill herein is copy of a petition filed with the respondents by Trustees of the Boston & Providence Railroad Corporation. It is the subject matter of said petition to the Department of Public Utilities which we say should not be entered upon. At a preliminary hearing upon said petition, we filed a motion to dismiss

469

said petition of the Boston & Providence Trustees. A copy of said motion to dismiss is likewise attached to each of these bills in equity, and contains generally the reasons why we believe the Department of Public Utilities lacks power under the law to proceed in the matter. The motion to dismiss was overruled, and the Department of Public Utilities has given notice that it will proceed to hold hearings upon said petition of the Boston & Providence Trustees.

I.

470

THE JURISDICTION OF THIS COURT.

* * * *

II.

THE BOSTON & PROVIDENCE PETITION.

The petition of the Boston & Providence Trustees to the Department of Public Utilities purports to be filed under section 10 of the Boston Terminal Company Charter (Acts of 1896, Chapter 516). The material part of said section 10 is set out in the petition of the Boston & Providence Trustees, in paragraph 4 thereof (see copy of said petition 471 attached to these bills in equity). The second sentence begins:

> "Each of said railroad companies shall pay for such use of said station and facilities in *the proportion in which it has the use thereof* * * *."

The last sentence in said section 10 gives this Court jurisdiction in equity to compel such payments to be made.

The evident purpose of the Terminal Act was to create a union station, and require the five railroads on the

472 south side of the city to use it. The Boston & Providence was then entering Park Square, the Albany at Kneeland Street, the New England via Fort Point Channel, to Summer Street. The act required those railroads to use the terminal, in the sense that their own stations must be given up; and this was necessary, even though in 1896 the Old Colony, the Boston & Providence and the New England were controlled or operated by the New Haven Railroad. In the absence of such requirement, conceivably the act might not apply to a lessor railroad if its lease were terminated.

473 However, section 10, in respect to *paying for use*, clearly is a provision primarily for the benefit of the Terminal Company itself, imposing the obligation to pay, and making it enforcible. Section ten requires payment on the *basis of use*. It is only a *user*, while acting as such, with which any proceedings before the Railroad Commissioners (now Department of Public Utilities) are concerned. In 1931 there were long-drawn-out hearings before the Department of Public Utilities involving the percentages to be paid by the Boston and Albany and the New Haven. As such, the New England (then merged with the New Haven), the Old Colony (leased to the New Haven), and the Boston & Providence (leased to the Old Colony), were
474 in no wise concerned with that proceeding. The 1931 order of the Department of Public Utilities did not concern itself with apportioning expenses between the New Haven, the Old Colony and the Boston & Providence.

The Assistant Attorney General, and Counsel for the Boston & Providence, who addressed this Court, seemed to view the efforts of your petitioners to prevent action now by the Department of Public Utilities as an attempt to disregard or to escape the obligations of a state statute enacted under the police power, on some theory that the act does not apply to them. That is not so. The Terminal

475

Company is not in bankruptcy. It is and always has been insolvent in the sense that its expenses far exceed its revenues. We do not question the application of the act as between users, even if one should be in bankruptcy. For example, if which is not the fact, the New York Central (lessee of the Boston and Albany) and we, Trustees of the New Haven, were in disagreement as to the division of the Terminal Company expenses between us, we have no doubt that either the New York Central, or we, would have the right to petition the Department of Public Utilities to settle the question. The fact that the New Haven is in bankruptcy would not be material, so 476
long as the obligation fixed by the charter remained unchanged. Whether the obligation to use the Terminal, and the obligation to pay for such use, or either of them, can be broken or disregarded may well admit of serious doubt, so long as the charter remains unchanged. No such contention is made by us. We make no attack on the statute, nor upon the power of the Department of Public Utilities under the statute, in an applicable case. No contention is made that there is a conflict between the bankruptcy proceedings and the statute. There is none, for we as users are paying our present fixed proportion of the Terminal Company expenses.

Nor is there any pertinency in the contention made be- 477
fore this Court that the decision in the Second Circuit Court of Appeals is controlling here. It is not even in point. In that case, a Massachusetts statute forbade a railroad to close a passenger station without first getting written consent of the Department of Public Utilities. The bankruptcy court held that in a great emergency (he found that the Old Colony Railroad was losing over $10,000 *per day* in its passenger operation), the court could order its Trustees to reduce losses by reducing service. The Circuit Court of Appeals held (two to one)

478 that in the absence of *express* language the court lacke
that power, and that it could not be implied. That de
cision will be reviewed by the United States Supreme
Court, who have granted certiorari.

The issue here is in fact different. We, your petitioners
are paying the 70% of the Terminal expenses, which in
1931 it was decided should be the proportion of the New
Haven system. The Boston & Providence are paying the
Terminal Company nothing. Were the Boston & Provi
dence Trustees operating their properties, were they
479 separate user, the statute clearly would apply. But the
Boston & Providence are not using their property, no
using the Terminal, nor making any payments therefor
Meanwhile, this railroad is being operated by us, your
petitioners, by order of the Federal Court in Connecticut
and with the approval of the Massachusetts Federal Court
When the Massachusetts Federal Court on August 5, 1938
approved the petition of a creditor for the reorganization
of the Boston & Providence Railroad Corporation, it
ordered:

> "That until further order, all persons, * *
> are restrained and enjoined * * * from inter
> fering in any manner with the *present operation*
480 of its railroad or properties or the carrying on o
> its business * * *."

That order is still in effect. Admittedly, the Federal
judge operating said railroad, has assumed, while so doing
to charge and credit expenses and revenues in the same
manner in which he does so with respect to other proper
ties operated by him.

It is the conviction of your petitioners that the Trus
tees of the Boston & Providence have no desire to have
only a determination of the Terminal expenses betwee

481

the Boston & Albany on one side and your petitioners on the other side. They are not really concerned with that—there is no disagreement between the Boston and Albany and your petitioners. What the Boston & Providence Trustees desire is a breakdown of that 70% which we, as such operating Trustees, are paying. In the Connecticut Federal Court they have attacked the action of that Court so far as it relates to charges against the Boston & Providence. Being unable to secure what they want in that court's administration accounting, although the same has been appealed to the Circuit Court of Appeals, they now want the Department of Public Utilities to make a decision which they hope will be more favorable.

482

This conviction of your petitioners is no mere belief, no mere assertion. It is found clearly stated in the petition of Boston & Providence Trustees to the Department of Public Utilities. (Copy attached to these bills in equity.) In Paragraph No. 7, they say that your petitioners have continuously operated all these railroad properties, including those of Boston & Providence up to the present time, and in that connection have used the South Station. Again, in Paragraph No. 8, they repeat the statement. But it is in Paragraph No. 10 of their petition that the truth is disclosed, namely, that their petition is filed with the Department of Public Utilities, because they prefer to have the Department of Public Utilities, and not the Connecticut Federal Court where the matter is pending, determine the matters of accounting. Said Paragraph No. 10 of the Boston & Providence Trustees states:

483

> "10. That it now appears to be desirable and necessary to have a determination by this department under the provisions of Statutes of 1896, C. 516, of the proper proportion of expenses to be paid

484 by the various using railroads for the use of said South Station to the end that the extent of the charges therefor against B & P may be fairly and equitably determined, *for the reason that the Trustees of New Haven and Old Colony now propose to charge B & P* not only in the future but also for a period from June 4, 1936 (the day after the rejection of said Old Colony lease) up to the present time *with such share of the expenses of said South Station as may be determined by the United States District Court for the District of Connecticut;* and
485 that such proposed charges by such Trustees for the period from June 4, 1936 to December 31, 1937, inclusive, are contained in an accounting now pending in said United States District Court for the District of Connecticut, * * * and that, *in the opinion of your applicants, the proper tribunal to determine said charges is the Department of Public Utilities in Massachusetts and not said United States District Court for the District of Connecticut.*"

It is this collateral attack upon matters pending before the Connecticut Court, matters which are properly before that Court as a court of bankruptcy, matters relating solely
486 to the administration of properties being operated by that Court, matters in which said Boston & Providence Trustees are parties in that Court, which we deprecate, and in these bills seek to have prevented.

III.

The Bankruptcy Statute.

The statute, under which the Connecticut Court is proceeding, is Public No. 381, approved August 27, 1935, being

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Section 77 of the Federal Bankruptcy Act. It appears in U. S. C. A., Title 11, sec. 205. It is designed to permit the reorganization of railroads, without the necessity of expensive receiverships. Where a petition for reorganization is approved as properly filed the Court has exclusive jurisdiction of the debtor and its property wherever located, and also such powers which the Court would have had had it appointed a receiver in equity. Par. (a). Trustees shall be appointed. Par. (c)(1). Trustees shall file schedules and other information necessary to disclose the conduct of the debtor's affairs. Par. (c)(4). Where a lease is rejected, the court may order the lessee to continue operation *on or for the account of the lessor.* Par. (c)(6).

488

Paragraph (c)(10) reads:

> "The judge may direct the debtor or the trustee or trustees to keep such records and accounts, in addition to the accounts prescribed by the Commission, as will permit of such a *segregation and allocation*, as the necessities of the case may require, of the *earnings and expenses* between and to the *divisions and parts* of the railroad or other property of the debtor which are separately subject to the liens of the various mortgages or deeds of trust, or separately subject to lease, and *may refer to the Commission* for its recommendations after hearings thereon if the parties shall so request and/or the Commission determine necessary or desirable, as to the *method or formula by which such segregation and allocation shall be made;* and thereafter such segregation and allocation may be made at the expense of the debtor's estate."

489

It is this matter of accounting and administration, this segregation and allocation of earnings and expenses between

490 and to divisions and parts, expressly provided for in the quoted paragraph, which the Boston & Providence Trustees seek to have passed upon by the Department of Public Utilities, although the Connecticut Federal Court itself has this matter in its charge, and repeatedly has passed upon the subject. The subject matter is the allocation, under the Bankruptcy Act, of earnings and expenses of properties within the possession of, under the control of, being operated by, the Bankruptcy Court.

* * * * * * * * *

IV.

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OUTLINE OF PROCEEDINGS HAD IN THE CONNECTICUT FEDERAL COURT, PERTINENT TO THESE PROCEEDINGS.

As the Court well knows, The New York, New Haven and Hartford Railroad Company, on October 23, 1935, filed its petition for reorganization under Section 77 of the Bankruptcy Act. Your Petitioners are the Trustees of its estate. At that time, the New Haven system consisted of many separate ownerships, including, among the many others, its lease of the Old Colony Railroad Company, which in turn was lessee of the Boston & Providence Railroad Cor-

492 poration.

In June, 1936, the Trustees appointed by the Connecticut District Court to administer the New Haven's estate rejected the Old Colony lease. From then on, many things took place which are material to the matters involved in these bills in equity. Counsel have selected and filed with the Court certified copies of certain petitions, orders, decisions, and other matters, which are taken from the printed proceedings in the New Haven reorganization. These will now be explained.

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(1) Petition for Order No. 217 was a petition filed October 7, 1937 (Record, 3263), by Bankers Trust Co., a New Haven creditor. This petition requested the court to direct its Trustees, who are your petitioners herein, to cease making cash payments out of the New Haven estate under the terms of the Boston & Providence lease. The eighth and ninth paragraphs of the petition (Record, 3268-3271) alleged that the Court's Trustees had recently completed a segregation of revenues from and expenses of the New Haven's leased and mortgaged lines, which showed that the Boston & Providence was being operated at a large loss, and the petition asserted that no further payments 494
on account of the Boston & Providence lease should be made out of the New Haven's estate to the detriment of New Haven creditors.

An order (Record, 3279, annexed to the petition) was entered forthwith, providing that if any answer to the petition should challenge the *segregation of revenues and expenses as constituting a proper basis for the determination of the earnings of the property of the Old Colony or the property of the Boston & Providence*, the parties should show cause why the Court should not refer the issues thus raised to the Interstate Commerce Commission for its recommendation as to the method or formula by which said segregation should be made, all pursuant to the Bank- 495
ruptcy Act, Section 77, (c)(10).

(2) The Boston & Providence filed on October 21, 1937, its answer to the Petition for Order No. 217 (Record, 3427). It was signed by Mr. Bentley W. Warren, now one of the Boston & Providence Trustees. In Paragraph 2 of this answer, it appears that the Boston and Providence had intervened in these proceedings. In Paragraph 8, it challenged the "Segregation of Revenues and Expenses" which had been prepared by the New Haven Trustees. It denied

496 that the segregation showed a loss from operations of Boston & Providence properties, or in fact gave any indication of the result of operations of Boston & Providence properties.

Paragraph 14, of said Boston & Providence answer reads:

"14. Further answering to the Petition, this Corporation alleges:

That the 'Segregation of Revenues and Expenses by Leased and Mortgaged Lines' does not constitute a fair basis for the determination of the earnings of the property of Boston and Providence
497 Railroad Corporation or of charges for such operation which should in equity be borne by it, for the following reasons:

(a) Said segregation does not allocate to Boston and Providence Railroad Corporation a fair proportion of revenues derived from operation of the Debtor's properties to compensate this Corporation for the terminal services performed by it. The 'Road Haul—Terminal Formula' is admittedly based upon average terminal expenses and average expenses for road haul, both for the entire New Haven System, and the segregation is, therefore,
498 inconsistent in that it charges the actual terminal expenses at each of its terminals to the leased or mortgaged roads on whose property the terminal is located, and purports to compensate it therefor on a basis of the consideration of average charges over the entire system. The constructive mileage block arrived at by said formula necessarily would fully compensate only terminating railroads whose terminal and road haul expenses do not exceed such average terminal and road haul expenses for the entire system.

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In the alternative, this Corporation does not admit that the terminal expenses shown in said segregation as charged against the Boston and Providence Railroad Corporation on account of the operation of its properties, are correct or conclusive, and further alleges that the use factors and other factors upon which such charges are based are indecisive, and the inaccuracies therein are pyramided and multiplied in said segregation to the detriment of Boston and Providence Railroad Corporation in the application of such factors to the many accounts dealt with therein. In addition, 500
said segregation contains no formula for compensating terminating railroads for the terminal expenses incurred by them in handling passenger traffic, notwithstanding the fact that the entire amount of such passenger terminal expenses are charged directly to the railroad on whose property such operations are performed.

(b) The segregation does not recognize the value or the essential nature of the terminal services performed by Boston and Providence Railroad Corporation to the remainder of the New Haven System. Said segregation does not recognize the benefits 501
derived by Old Colony Railroad Corporation and New England Railroad Company from the services in connection with commuter and local traffic which are performed by Boston and Providence Railroad Corporation as an accommodation to said other railroad corporations, or the value or the essential nature of the services performed by Boston and Providence Railroad Corporation in connection with through passenger service, to other portions of the New Haven System; all of which terminal expenses are charged in their entirety to this Corporation.

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(c) The Petition of Bankers Trust Company does not consider the intangible elements of value of this Corporation's property which are set forth at Pages 21-22 of the 'Severance Studies' compiled by the agents of the principal Debtor and relied upon by the Plan Committee of the principal Debtor in arriving at its determination to include the assumption of the Boston and Providence lease by the New Corporation proposed in its Plan. This Corporation alleges that these elements of value are conservatively appraised in said Severance Studies and, in its opinion, are of greater value than that placed upon them in said Severance Studies or by the Plan Committee of the principal Debtor."

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Can anything be clearer than the fact that the issues so raised are the identical ones sought by Boston & Providence to be decided by the Department of Public Utilities?

(3) The result was that on October 29, 1937, the Court issued an order (Record, 3587) referring, pursuant to the statute, the question of the segregation of revenues and expenses to the Interstate Commerce Commission. The Interstate Commerce Commission was requested to transmit to the Court its recommendation as to the *method or formula* by which the segregation and allocation should be made.

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(4) The next document submitted to this Court is a short transcript of minutes of a certain court proceeding (Record, 3805). This is offered only to show that the Court suggested (Record, 3810) that the New Haven Trustees file an accounting of their administration of the Old Colony, which at that time still included the Boston & Providence leasehold; and to show that the Court cautioned all parties

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to take pains to see that the original record before the Interstate Commerce Commission was complete on the matter of the segregation formula (Record, 3814).

(5) On April 9, 1938, the Interstate Commerce Commission made its report on the segregation formula (Record, 4241). It should be noted that Mr. Bentley W. Warren was listed among counsel who participated before the Commission.

Referring to the statute providing for a segregation and allocation of earnings and expenses, the Interstate Commerce Commission said (Record, 4243): 506

> "The reason for this provision is obvious. Under our accounting classifications, accounts of a railroad system operated as such are required to be kept only for the entire system, and reflect the results of operations of the system as a whole. Separate operating revenue and expense accounts are not required to be maintained for individual mortgaged or leased lines of a system. In order to ascertain the earnings of the latter, it is necessary to divide the system earnings between its member parts."

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The Commission also said (Record, 4244):

> "Our function, as we construe the order of reference and the language of section 77(c) (10), is to recommend to the court a method or formula that will permit the ascertaining, with some certainty, of the earnings, as well as the expenses, of each mortgaged and leased line operated as an integral part of the debtor's system. Our recommendations herein are in no wise intended to express any views with respect to the use of the results obtained from

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the application of the formula or the weight to be given such results."

The Commission then proceeded to summarize your petitioners' method of segregation and allocation, to state and answer objections thereto, and to state their conclusions. At the end (Record, 4255), the Commission said:

"After considering all available data as well as the criticisms thereof, we find that the trustees' method of segregation and allocation of the debtor's revenues and expenses between and to its various
509 mortgaged and leased lines is as fair and equitable as the circumstances will permit, and so recommend to the court."

(6) Next, there was submitted to this Court, copy of the New Haven Trustees' report of their administration of the Old Colony property (Record, 4221). This was filed ten days after the Interstate Commerce Commission decision approving the method. The administration period covered was through the calendar year 1937. It will be noted that the summary appended as Exhibit 1 to this report separated items between the Old Colony, the Boston & Providence, and the Providence, Warren & Bristol,
510 though all these roads then were still part of the Old Colony estate.

(7) Returning to the matter of the segregation formula, the Court, on April 19, 1938, entered an order (Record, 4239), requiring parties to show cause at a hearing why the findings and recommendations of the Interstate Commerce Commission should not be confirmed by the Court.

(8) Thereafter, on May 28, 1938, it appearing that no party had filed exceptions to the Interstate Commerce

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Commission report, the Court entered its order No. 283 (Record, 4399) confirming and accepting the findings and recommendation of the Interstate Commerce Commission. No appeal was ever taken from this order.

"(9) Meanwhile, interested parties were given opportunity to file exceptions to the Report of the Trustees on the Old Colony administration. The Court's memorandum on said report (Record, 4511) is dated July 2, 1938. It is pointed out (Record, 4513) that objections to the accounting were interposed by special counsel for Old Colony Trustees, and these were adopted by various parties, including Boston & Providence. The Court pointed out (Record, 4515) that "* * * the filing of the New Haven petition was notice to all the world of the assumption of jurisdiction by the court and likewise notice that *those thereafter operating the property did so as officers of the court and subject to its orders.*" The Court then sketched the evolution, status and nature of the segregation method (Record, 4520-4524). In this discussion the Court said:

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> "From this starting point, the method, recognizing that the system is the sum of its parts, allocates the entire revenues and expenses of the system amongst the numerous segments which are subject to separate paramount lien and lease. Thus the accomplished result is such that the system as an entity disappears and we see nothing but a group of numerous segments which between them enjoy all the revenues and necessarily must be deemed to have assumed *all* the expenses.
>
> "But the method recognizes the obvious inequity of leaving one segment which includes a valuable and expensive facility which serves not only the 'owner-segment' but also perhaps several user-segments', to

514 bear all the expense of that singly-owned but severally used facility. Consequently the method provides how such an expense shall be allocated amongst the segments involved and provides for a charge in the nature of rental against a user-segment. This is accomplished by the application of use-factors, the detail of which it is not now necessary to discuss since the equity of the process has already received illuminating and approving discussion by the Commission in its report and has been approved by the court after hearing duly noticed without objection from any source.

515 "As a result, it must be borne in mind throughout that a user-segment cannot be relieved of the charge, or any part thereof, resulting from the application of an approved use-factor unless that charge is absorbed by some other segment. Thus individual changes in the application of the method are inconsistent with the inherent integrity of the method."

(10) It should be pointed out that on an appeal by the Old Colony in this accounting matter, the Circuit Court of Appeals for the Second Circuit, in an opinion rendered May 8, 1939 (Record, 5645), held, in connection with two issues raised concerning the allocation of revenues and 516 expenses, that the Interstate Commerce Commission had necessarily passed upon these issues when it had had the segregation formula under consideration, and that no evidence subsequently offered to alter the approved segregation method was admissible (Record, 5654, 5657).

(11) We began this discussion of pertinent proceedings in the Connecticut Court by reference to the petition for Order No. 217, which sought cessation of payments under the Boston & Providence lease. On July 2, 1938, the same day the Court made its memorandum on the Trustees' Re-

port of their Old Colony administration (Record, 4511), referred to above, the District Court also rendered a second memorandum (Record, 4497), being a decision on the petition for Order No. 217. This held that the Old Colony Trustees should reject the Boston & Providence lease, and that the New Haven estate should not be subjected to further expense on account of this lease. Incidentally, this memorandum discloses that the Boston & Providence had offered further objections to the approved segregation formula, and that these must be overruled (Record, 4508).

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(12) In due course, on July 19, 1938, the Court entered Order No. 217 (Record, 4597). This not only directed the rejection of the Boston & Providence lease, but also contained these important provisions:

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"5. Pending further order of Court the operation of the property of Boston and Providence for the account of that corporation shall be continued pursuant to subdivision (c) (6) of Sec. 77 of the Bankruptcy Act, and since the Old Colony Railroad Company, as lessee of Boston and Providence and likewise the Old Colony Trustees, are wholly without any operating organization, the operation of Boston and Providence properties shall be conducted by the New Haven Trustees in behalf and for the account of the Old Colony estate but without expense to the New Haven estate.

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"The Court reserves for further hearing the right to determine the existence and amount of any obligation of Boston and Providence arising out of operation of its property or payments made to it or on its behalf prior to the rejection of its lease, and the liability of the Boston and Providence therefor to the Old Colony estate and by way of subrogation to the New Haven estate."

520 (13) The remaining documents offered this Court merely complete the record on this subject. The first is the Petition for Order No. 301 (Record, 4621) being a petition of the Trustees for a charge upon the earnings and property of Boston & Providence. This was made necessary by the rejection of the Boston & Providence lease. Then comes a statement of the objection of the Boston & Providence Corporation (Record, 5009) with respect to the petition just referred to. Next is the Court's memorandum on jurisdictional objections to the petition (Record, 5257). Then comes the objections of the Boston & Providence
521 Trustees to the petition for Order No. 301 (Record, 5459). These objections directly attack the accounting and the method. These cannot readily be summarized, but must be read as set forth. Such reading will show clearly why the petition of these same Boston & Providence Trustees to the Department of Public Utilities seeks the same end which they sought in the Connecticut Court proceedings. Incidentally, the said Boston & Providence Trustees in their objections point out that the account is not a true agency account—that the theory underlying the account precludes the application of fundamental principles of accounting as between agent and principal. Finally, on April 18, 1939, the Court entered its findings and conclu-
522 sions (Record, 5561) on the petition for Order No. 301, and then, on April 20, 1939, entered its order No. 301 (Record 5575), making such charge.

(14) It is pertinent here to point out that at a hearing before the Connecticut Court on April 3 and 4, 1939, on the matter of the petition for Order No. 301, and the objections of the Boston & Providence Trustees thereto, counsel for the Boston & Providence Trustees offered to prove that no determination of this matter of charges against the Boston & Providence had been made by the

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Massachusetts Department of Public Utilities. (Minutes, pp. 84-90, and 116-122.) The evidence was excluded. An appeal from Order No. 301 is now pending.

(15) If any further evidence could possibly be needed that what the Boston & Providence Trustees seek before the Department of Public Utilities is an adjudication of a matter wholly within the jurisdiction of the Federal Court of Connecticut, that is, the question how that Court subdivides Boston Terminal Company charges applicable to that Court's use of the Terminal as between the Boston and Providence and the Old Colony, we quote the language in a letter, serving as a *duces tecum*, to the Superintendent of the Boston Terminal Company in said Department of Public Utilities proceeding. The language is:

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> "* * * and bring with you all the books and records of the New York, New Haven & Hartford Railroad Company and Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, as the Trustees of the property of the New York, New Haven & Hartford Railroad Company, having to do with all expenses either incurred or paid by said New York, New Haven & Hartford Railroad Company or by said Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, as its Trustees, for the period from June 1, 1936 up to and including the present date, together with all books and records having to do with the distribution or re-allocation of such expenses by said railroad company or said Trustees to Old Colony Railroad Company or its Trustees, or Boston & Providence Railroad Company or its Trustees, without in any way limiting the genarality of the foregoing, bring with you the account covering 'Joint Facility Rents—Net. Dr. '; New Haven

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526 Accounts numbered 278, 336, 390, 461 and 541, and all operating accounts, whether numbered or otherwise, under the general accounts entitled 'Maintenance of Way and Structures', 'Maintenance of Equipment', 'Traffic', and 'Transportation' in which were entered any items of income or expense in connection with the South Station, Boston, Massachusetts, during the period from June 1, 1936 up to the present date. Also bring with you all bills rendered to the New York, New Haven & Hartford Railroad Company or the Trustees of its property for an during the period from June 1, 1936 up to
527 the present date, including not only the bills for joint facility rents, but also all bills for operating expenses. Also bring with you, if your allocation of South Station expenses to Old Colony Railroad Company or its Trustees and Boston & Providence Railroad Corporation and its Trustees was on a percentage basis rather than on the basis of itemized bills for specific services rendered to each, all formulae, car counts, train counts, passenger counts, counts of switching operations and counts in detail of other expenditures going to show the totals from which you allocated or re-allocated such South
528 Station expenses to said Old Colony Railroad Company or its Trustees and said Boston & Providence Railroad Corporation or its Trustees, including specifically in connection with such train counts information as to whether or not each such train so counted originated on lines of the Boston & Providence, or on so-called Old Colony, New England, or New Haven lines, the mileage run of each such train on the Boston & Providence and on other parts of the New Haven system, and the number of passengers on each such train who origi-

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nated on or was destined to parts of the New Haven system other than lines owned by the Boston & Providence Railroad Corporation."

V.

CONCLUSIONS.

It is respectfully submitted that from the foregoing the following conclusions must of necessity be drawn:

(a) The sole reason assigned in the Boston & Providence Trustees' petition to the Department of Public Utilities is the attempt to influence the assessment of charges by the Federal District Court in Connecticut based upon accountings by that Court's Trustees.

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(b) It is admitted in said petition, and otherwise appears, that the New Haven Trustees, your petitioners herein, have at all times from the beginning of the reorganization proceedings up to the present been operating the properties of the Boston & Providence.

(c) That it is the New Haven Trustees, and not the Boston & Providence Trustees, who are using the Boston Terminal, in connection with their operation of the Boston & Providence properties.

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(d) That under the Bankruptcy Act the exclusive jurisdiction to ascertain and assess obligations against any property operated by said Trustees lies in the Federal Court.

(e) That the Federal Court has made such a determination in the matter.

(f) That the method of making such determination has been approved by the Interstate Commerce Commission pursuant to the very language in the Bankruptcy Act.

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(g) That there is in fact nothing for the Department of Public Utilities to adjudicate.

(h) That whether the accounting was made under a formula, or was made in the absence of a formula, would not in any way give the Department of Public Utilities jurisdiction to determine issues relating to said accounting.

(i) That even if the Department of Public Utilities should proceed and issue an order, such order still would have no effect upon the accounting in the Federal Court.

(j) That this Court would not undertake to enforce any
533 such order of the Department of Public Utilities.

(k) That it is within the sole jurisdiction of the Federal Court to divide costs between the railroads which that Court is operating in the use of the Boston Terminal.

(l) That the provisions of the Terminal charter, under which the Boston & Providence Trustees have filed their petition to the Department of Public Utilities, are not applicable in the premises.

(m) That until the Boston & Providence Trustees take over and begin to operate their railroad, the petition of said Trustees is premature.

534 (n) That there is in fact nothing to prevent the Boston & Providence Trustees, if they really desire to do so, from taking over and operating their railroad.

HOWARD S. PALMER, JAMES LEE LOOMIS, HENRY B. SAWYER, Trustees, THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor

By A. W. BLACKMAN
Their Attorney

f) Certificate of Assessment by City of Boston of the Boston Terminal Company Properties. 535

CITY OF BOSTON
BOARD OF ASSESSORS
CITY HALL

December 11, 1939

Whom It May Concern:

The records of the Assessing Department show the following assessed title for 1939 on the property described below: 536

Card 3 Line b-3562 "Boston and Albany Railroad and New York, New Haven and Hartford Railroad Company, *Lessees* of New England Railroad Company, Boston and Providence R. R. Company and Old Colony R. R. Company"

Value:

South Station 16,000,000
Tax $638,400.00 537

/s/ J. A. COAKLEY
Chief Clerk

Notice of Appeal by Old Colony Trust Company, Trustee, From Order No. 398.

538 DISTRICT COURT OF THE UNITED STATES

DISTRICT OF CONNECTICUT

In Proceedings for the Reorganization of a Railroad.

No. 16562.

In the Matter of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor.

---

539 Notice is hereby given that Old Colony Trust Company, Trustee, hereby appeals to the Circuit Court of Appeals for the Second Circuit:

1. From the order of the District Court for the District of Connecticut, numbered 398 in the above proceedings entered on October 30, 1939.

By its Attorneys

/s/ OSCAR W. HAUSSERMANN
/s/ ROBERT H. DAVISON

Address: 15 State Street
Boston, Massachusetts

(Stamped on back)
Filed:
540 Clerk, U. S. District Court
Nov. 28, 1939

Cost bond on appeal is
hereby waived

/s/ H. J. WELLS
Counsel for Trustees
of The New York, New Haven
and Hartford Railroad Company

/s/ R. H. DAVISON
Counsel for Old Colony Trust Company,
Trustee

Stipulation as to Record.

541

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF CONNECTICUT.

In Proceedings for the Reorganization of a Railroad.

In the Matter

of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor. 542

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, Trustee,

Appellant,

—against—

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees of the property of The New York, New Haven and Hartford Railroad Company,

Appellees.

IT IS HEREBY STIPULATED AND AGREED that the foregoing 543
is a true transcript of the record of the said District Court in the above entitled matter as agreed upon by the parties.

Dated, January 5th, 1940.

OSCAR W. HAUSSERMANN AND
ROBERT H. DAVISON,
Attorneys for Appellant.

HERMON J. WELLS,
Attorney for Appellees.

544 **Clerk's Certificate.**

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF CONNECTICUT.

In Proceedings for the Reorganization of a Railroad.

In the Matter

of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD
545 COMPANY,

Debtor.

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, Trustee,
Appellant,

—against—

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees of the property of The New York, New Haven and Hartford Railroad Company,
Appellees.

546

United States of America,
District of Connecticut—ss.:

I, CHARLES E. PICKETT, Clerk of the District Court of the United States of America for the District of Connecticut, DO HEREBY CERTIFY that the foregoing is a true and correct transcript of the record of said District Court in the matter of Order No. 398 in the reorganization proceedings of The New York, New Haven and Hartford Railroad Company and in the matter of the appeal from said order, as agreed upon by the parties.

Clerk's Certificate.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed in the City of New Haven, in the State of Connecticut this fifth day of January, in the year of our Lord one thousand nine hundred forty and of the Independence of the said United States the one hundred and sixty-fourth. 547

CHARLES E. PICKETT,
Clerk.

(Seal)

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Opinion, Circuit Court of Appeals.

553

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 249—October Term, 1939.

(Argued March 6, 1940 Decided April 16, 1940.)

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, Trustee,
Appellant,

—against—

554

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees of the property of The New York, New Haven and Hartford Railroad Company,
Appellees.

Appeal from the District Court of the United States for the District of Connecticut.

555

Proceedings in reorganization of The New York, New Haven and Hartford Railroad Company, Debtor, wherein Howard S. Palmer and others, Trustees of the Debtor, petitioned for directions concerning payment of taxes and other charges for the account of the Old Colony Railroad Company and the Boston and Providence Railroad Corporation. From an order directing the trustees to withhold further payments, Webster and Atlas National Bank of Boston, Trustee for the first mortgage bondholders of the Boston Terminal Company, appeals. Reversed.

Before—SWAN, CLARK and PATTERSON, *Circuit Judges.*

556 ROBERT H. DAVISON, of Boston, Mass. (Haussermann, Davison & Shattuck and Oscar W. Haussermann, all of Boston, Mass., on the brief), for appellant.

HERMON J. WELLS, of New Haven, Conn. (J. H. Gardner, Jr., of New Haven, Conn., of counsel), for appellees.

HENRY PARKMAN, JR., Corp. Counsel, and Robert H. Hopkins, Asst. Corp. Counsel, both of Boston, Mass., *amici curiae*.

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557 CLARK, *Circuit Judge*.

In October, 1935, the New Haven Railroad filed its petition for reorganization in the District Court of the United States for the District of Connecticut. In June, 1936, its trustees rejected the lease under which the New Haven had rented the lines of the Old Colony Railroad Company. Immediately thereafter, the Old Colony petitioned for reorganization in the same court and the trustees of the New Haven were appointed trustees of the Old Colony. Since the Old Colony was wholly unable to operate its lines alone, the District Judge, pursuant to the mandate of Bankruptcy Act, §77(c) (6), 11 U. S. C. A. §205(c) (6),
558 ordered the trustees of the New Haven to continue to operate the lines of the Old Colony until further notice, "such operation to be for the account of the Old Colony." In 1938, the trustees of the Old Colony rejected its lease of the lines of the Boston and Providence Railroad Corporation. The Boston and Providence is similarly unequipped for independent operation; the District Judge therefore ordered the New Haven trustees to operate for the account of the Boston and Providence, under the same statute.

A segregation formula, allocating revenues and expenses among the various mortgaged and leased lines, was pre-

pared by the New Haven trustees and after hearings the Interstate Commerce Commission recommended its acceptance by the court. The District Court did so and we affirmed. *Palmer* v. *Palmer*, 2 Cir., 104 F. 2d 161, certiorari denied 60 S. Ct. 120. Under that formula, it appears that both the Old Colony and the Boston and Providence suffer heavy operating deficits each year. These deficits are met by the New Haven trustees out of New Haven funds; the New Haven in turn has been given a prior lien upon all the assets of the two operated roads. *Palmer* v. *Warren*, 2 Cir., 108 F. 2d 164, certiorari granted 60 S. Ct. 607. 559

Deficits met by the New Haven now exceed $20,000,000. It has become apparent that the prior lien afforded the New Haven is not a sufficient security to warrant the diversion of additional funds, without jeopardy to the claims of New Haven's own secured creditors. The New Haven trustees have made several efforts to reduce their outlays on behalf of the Old Colony and the Boston and Providence. They obtained an order permitting the abandonment of 88 unprofitable Massachusetts stations, but we reversed that order for failure to comply with applicable state laws. *Converse* v. *Massachusetts*, 2 Cir., 101 F. 2d 48, affirmed sub. nom. *Palmer* v. *Massachusetts*, 308 U. S. 79. 560

The present suit is another attempt to reduce the New Haven's contribution to the deficits of its lessors. On their petition the New Haven trustees were granted an order below instructing them to withhold further payment of real estate taxes levied upon properties of the Old Colony and Boston and Providence Railroads in Massachusetts and Rhode Island, as well as further payment of real estate taxes, franchise taxes, and bond interest owed by the Boston Terminal Company, which operates South Station in Boston. The trustee of the Boston Terminal Company's first mortgage bonds appeared below in opposition, and 561

562 now appeals.[1] Counsel for the City of Boston, which also appeared below, but did not appeal, have been permitted to file a brief as *amici curiae* herein.

The items as to which the trustees sought and received instructions in the order below concerned (a) taxes due the City of Boston, assessed upon the South Station property, amounting to $446,880; (b) franchise taxes of $13,600 due the Commonwealth of Massachusetts from the Boston Terminal Company; and (c) interest due on the first mortgage bonds of the Terminal Company of $93,842. The court also directed that taxes of approximately $689,000 assessed by various Massachusetts and Rhode Island towns
563 against the Old Colony and the Boston and Providence be not paid; but the towns were not parties below, and this part of the order is not before us on this appeal. The only items now directly involved are the taxes and interest owed because of the erection and maintenance of South Station. All of these represent current charges; prior charges have been paid by the New Haven trustees.

In 1896, the Commonwealth of Massachusetts required the railroads serving Boston from the south and west to erect and use a union station. These railroads became stockholders of the Boston Terminal Company, chartered pursuant to Chap. 516 of the Special Acts of Massachusetts of 1896. That Act required five named railroads to
564 use the station; those railroads were bound by Section 10 of the Act to pay to the Terminal Company "for such use, in monthly payments, such amounts as may be necessary to pay the expenses of its corporate administration and of the maintenance and operation of said station, and of the facilities connected therewith and owned by said terminal company, including insurance and all repairs, all taxes and

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[1] The Old Colony Trust Co. was trustee of the Terminal Co.'s bonds until after this appeal was taken, at which time the Webster and Atlas National Bank became successor trustee and was substituted as appellant.

ssessments which may be required to be paid by said 565
erminal company, the interest upon its bonds or other
bligations issued under the provisions of this act as the
ame shall become payable, and a dividend, not to exceed
our per cent per annum, upon its capital stock." Section
0 also provided that each of the said railroad companies
hould pay "for such use" in the proportion in which it
ad the use thereof, to be fixed by agreement, or by de-
ision of the state board of railroad commissioners, and
he payments thus required to be made by the railroad
ompanies to the terminal company "shall be deemed a
art of their operating expenses, and the supreme judicial
ourt or any justice thereof shall have jurisdiction in equity 566
o compel such payments to be made, either by mandatory
injunction or by other suitable process."

The railroads named in the statute included the Boston
nd Albany, the Boston and Providence, the Old Colony,
nd the New Haven, "being lessee of the Old Colony Rail-
oad Company." When the New York Central leased the
Boston and Albany Railroad, the statute was amended so
as to include the former, also as "lessee". Mass. Acts 1921,
c. 363. Under the legislative authorization the Terminal
Company built and has since operated South Station as a
union passenger station in Boston. The burdens of main-
tenance, as required by Section 10 of the Act, have been
allocated among the railroads, according to use, by the 567
Massachusetts Department of Utilities, which succeeded the
board of railroad commissioners. While the New Haven
has not acquiesced in the Department's findings, the pro-
portions established by the Department (30% to the Boston
and Albany, 70% to the New Haven group) are not here
in issue.

The power of an equity court to rid an insolvent rail-
road of an unprofitable lease was modified by the 1935
amendments to Bankruptcy Act, §77. The public con-
venience dictates continued operation of the leased line

568 so long as practicable, yet rejection often would leave the line in possession of a lessor with no operating staff. Accordingly, §77(c) (6) now provides that, upon rejection of a lease of a line of railroad, the lessor has the duty to begin the operation of the line, "unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of section 1 of the Interstate Commerce
569 Act as amended (49 U. S. C. A. §1)." While it was recognized at the time that this provision would greatly inconvenience lessees (see Hearings before House Committee on the Judiciary on H. R. 6429, 74th Cong., 1st Sess. (1935) 145, 146), there was until recently no apparent consideration of the possibility that lessees in reorganization might *have to meet operating deficits incurred* on behalf of lessors. See Meck and Masten, *Railroad Leases and Reorganization*, 49 Yale L. J. 626, 658. We are convinced, however, that under this statute the lessee or its representatives must operate the leased line until the Commission permits abandonment. Even if the indispensable costs of operation result in net loss, that loss must be met, if necessary, out
570 of the funds of the lessee. It matters not that it has "rejected" the lease, for it may "reject" only such burdens as §77(c) (6) permits it to reject. The burden of operating, come what may, survives rejection.

The District Court agreed with this view up to a point, but concluded that, since such operation must be "on or for the account of the lessor," the Act was not to be construed to require operation after the lessor's account was exhausted, and added that such a construction would bring this sub-division in conflict with the Fifth Amendment. But we think that is to read the Act in such a way as to

iolate its primary purpose, to safeguard the continued 571
peration of a railroad, even at the temporary expense of
ne road's creditors. The ultimate continuance or discon-
nuance of service is a problem for the Interstate Com-
nerce Commission or equivalent state agencies. Speaking
or the Supreme Court in the *Eighty-eight Stations* case,
Ir. Justice Frankfurter has already admonished reorgani-
zation courts that their responsibilities are shared with
ther governmental agencies. Specifically apposite to our
resent problem is his statement: "The judicial process in
ankruptcy proceedings under §77 is, as it were, brigaded
ith the administrative process of the Commission. From
he requirement of ratification by the Commission of the 572
rustees appointed by the court to the Commission's ap-
roval of the court's plan of reorganization the authority
f the court is intertwined with that of the Commission.
Thus, in §77(c) and §77(o) the power of the district courts
o permit abandonments is specifically conditioned on
uthorization of such abandonments by the Commission."
Palmer v. *Massachusetts*, supra, 308 U. S. at page 87.

Of course, the trustees, by petition to the Commission
r to equivalent state authority, may seek abandonment
f any or all of the Old Colony, Boston and Providence,
r South Station services. The Commission and the state
gencies are as responsible agencies of government as are
he courts; there is no reason to suppose that they, any 573
nore than judges, will or can order the impossible or re-
use to accept the inevitable. At any rate there the re-
sponsibility has been placed by Congress. And we think
he constitutionality of §§77(c)(6) and 77(o) is estab-
ished by the cases upholding the provisions of the Inter-
state Commerce Act, 49 U. S. C. A. §1, placing control of
abandonment of interstate railroads with the Commission.
Colorado v. *United States*, 271 U. S. 153; *Palmer* v. *Massa-
chusetts*, supra.

The New Haven trustees have in fact been meeting those

574 deficits out of funds in the New Haven estate, and the New Haven has been left simply with its prior lien on the assets of its lessors, under the statutory provision that operations shall be for the lessor's account. But the trustees now contend that, inasmuch as they have been permitted to reject the lease, they should be relieved of all obligations under the lease except those the performance of which is vitally necessary to continued operation of the road. The public convenience is sufficiently served if operation continues. So, they say, the lessee may still be relieved of the duty of paying obligations of the lessor when payment is not absolutely vital to the continuation of
575 service. Neither the payment of taxes nor the payment of interest is immediately necessary to continued operation. The bondholders are obviously impotent, for the New Haven, the Old Colony, and the Boston and Providence are all in reorganization.[2] And despite the Act of August 21, 1937, 50 Stat. 738, 28 U. S. C. A. §41 (1), denying jurisdiction to the federal district courts to enjoin the collection of state taxes, where a remedy exists in the state courts, a reorganization court may, in its discretion, continue indefinitely to hold off the tax gatherer from taking direct action against the property. *Board of Directors of St. Francis Levee Dist. v. Kurn*, 8 Cir., 98 F. 2d 394, 397, certiorari denied 59 S. Ct. 153.

576 It is contended, however, that both the taxes and the interest are "operating expenses", as the Massachusetts statute provides. But it is not necessary to pass on whether either type of payment is an operating expense, nor need we decide whether §77(c) (6), in and of itself, requires the lessee to pay such expenses not indispensable to the continuance of railroad operations. Whatever the answer to these perplexing questions, federal statutes im-

[2] Since the order was entered below, the Terminal Company has also gone into reorganization.

pose upon the New Haven trustees a direct duty to meet 577
both the tax and the interest charges.

28 U. S. C. A. §124a, enacted in 1934, declares that "Any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation. * * *" This section was applied generally, even against the bankruptcy trustee's claim of lack of funds, in *Ingels* v. *Bolcler*, 9 Cir., 100 F. 2d 915, affirmed 308 U. S. 57. And it was held applicable 578
to a railroad's trustee under §77. *Thompson* v. *Louisiana*, 8 Cir., 98 F. 2d 108, 111.

The District Court held, however, that even if this statute ordinarily applied to railroad trustees, yet it did not apply when such officers were operating only for account of a lessor road under §77(c)(6). But we believe that, since that statute has placed the duty of operation upon the lessee, the lessee's trustees are thereby made "agents of the court" within the meaning of 28 U. S. C. A. §124a. The Old Colony, and the Boston and Providence, were they operating their lines, would have to pay their share of the taxes levied against the Boston Terminal Company. Section 25 of the Massachusetts statute of 1896 makes them 579
directly liable to the tax collector for the real estate taxes, and their duty under §10 of the same Act to pay all other taxes to the Terminal Company could be enforced directly by the taxing authorities. Now by law the duties of operation have devolved upon the New Haven, as lessee, and upon the New Haven trustees. If there existed sufficient moneys of the Old Colony and the Boston and Providence, no one could gainsay the duty of the New Haven trustees to apply those moneys to payment of the taxes. In accordance with the view we have expressed above—that operation

580 must continue until abandonment has been legally ordered, even though the New Haven trustees must go for funds to the New Haven estate—we conclude that under 28 U. S. C. A. §124a taxes legally assessed by state and local authorities must be paid by the New Haven trustees while operation continues.

Similar considerations apply to the payment of the interest on the bonds. As we have seen, the Massachusetts Act of 1896, establishing the Boston Terminal Company, made it the express duty of the Old Colony and the Boston and Providence to pay their proportionate shares of the interest on Terminal Company bonds. 28 U. S. C. A. §124 (1887), which is §65 of the Judicial Code, states that
581 "Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." A criminal penalty is also provided for violation of the statute. We feel that this section exercises a compulsion to pay the interest payments similar to that of §124a for tax payments.

It is true that the federal statute speaks only of a "re-
582 ceiver or manager." We have intimated that a railroad's trustee under §77 is included within this class. *Converse v. Massachusetts*, supra, 101 F. 2d at page 51. See also *Palmer v. Massachusetts*, supra, 308 U. S. at page 90, n. 17. That would mean, at most, that the trustees of the Boston and Providence and the trustees of the Old Colony are bound to obey the Massachusetts statute, to the extent of the funds available in their respective estates. But before the funds of the New Haven can be applied to the purposes of the Massachusetts statute, we must say that the trustees of the New Haven stand in such relation to the Old Colony

and the Boston and Providence that they may be deemed the "receiver or manager" of the Old Colony and the Boston and Providence, within the meaning of §124. We think they may. The statute speaks of a "receiver or manager in possession of any property" and refers to the duty to "manage and operate such property." It cannot be gainsaid that the New Haven trustees are in possession, and managing and operating the properties, of the Old Colony and the Boston and Providence. The words "receiver or manager" are broad enough to refer to any court officer performing these functions. 583

Section 124 may not require compliance with any and all state laws, but it does require compliance with this particular Massachusetts statute. It is beyond question that state statutes relating to speed of trains, abandonment of lines, liability for negligence, the medium in which wages are paid, and other similar police regulations must be obeyed by the receivers of a railroad. *Erb* v. *Morasch*, 177 U. S. 584; *Pittsburgh & Shawmut Coal Co.* v. *Delaware & N. R. Co.*, D. C. N. D. N. Y., 289 F. 133; *Hornsby* v. *Eddy*, 8 Cir., 56 F. 461; *Peirce* v. *Van Dusen*, 6 Cir., 78 F. 693; *Converse* v. *Massachusetts*, *supra*; *Burke* v. *Morphy*, 2 Cir., 109 F. 2d 572. Compliance with these laws in no way interferes with the federal equity and bankruptcy powers upon which the reorganization of railroads is based. In so far as the Massachusetts statute requires the named railroads to use South Station, it is undoubtedly a valid exercise of the police power. *Mayor and Aldermen of Worcester* v. *Norwich & Worcester R. R. Co.*, 109 Mass. 103. 584 585

Such a statute may properly impose the costs of construction and operation upon the railroads concerned, so long as the expense is not so great as to be confiscatory, when considered in relation to the importance of the interests to be affected and to be served. *Atchison, T. & S. F. R. Co.* v. *Railroad Commission*, 283 U. S. 380, 396, 51 S. Ct. 553, 75 L. Ed. 1128. The Massachusetts Act of 1896 has imposed

586 these expenses upon the named railroads by ordering them to pay to the Terminal Company all costs of operation, including bond interest on the Terminal Company bonds. Until such time as that law is amended or declared invalid, it must be obeyed. This record does not present any evidence that the charges are unreasonable or any basis for a declaration that the law is invalid.

In the view which we have taken of the case, it is not necessary for us to decide whether the provisions of the Massachusetts Act of 1896, imposing direct obligations on the New Haven, "being lessee" of the Old Colony, continue to bind the New Haven after it had rejected the lease. In
587 any event, the New Haven trustees, while operating the railroad pursuant to the court's order under §77(c)(6), are bound to pay the taxes and the interest charges for the reasons stated above.

Reversed.

588

Order for Mandate.

589

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 16th day of May one thousand nine hundred and forty.

Present—HON. THOMAS W. SWAN,
HON. CHARLES E. CLARK,
HON. ROBERT P. PATTERSON,
Circuit Judges.

590

In the Matter
of

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD CO.,
Debtor,

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON,
Appellant.

591

Appeal from the District Court of the United States, for the District of Connecticut.

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed with costs.

Order for Mandate.

592 It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. ROBERTS,
Clerk.

(Back)

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

593

In re

N. Y., N. H. & HARTFORD R. R.

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON,
Appellant.

ORDER FOR MANDATE.

United States Circuit Court of Appeals

594 Second Circuit

Filed May 16, 1940

D. E. ROBERTS, Clerk

Clerk's Certificate.

595

UNITED STATES OF AMERICA,

SOUTHERN DISTRICT OF NEW YORK.

I, D. E. ROBERTS, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 198, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

In the Matter

of

NEW YORK, NEW HAVEN and HARTFORD RAILROAD COMPANY, 596
Debtor,

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON,
Appellant.

as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this twenty-first day of May, in the year of our Lord one thousand nine hundred and forty, and of the Independence of the said United States the one hundred and sixty-fourth.

597

D. E. ROBERTS,
Clerk.

(Seal)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.